STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

MICHIGAN HOUSE OF REPRESENTATIVES And MICHIGAN SENATE,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, in her official capacity as Governor for the State of Michigan,

Defendant-Appellee,

Supreme Court No. 161377

Court of Appeals No. 353655
Court of Claims No. 20-000079-MZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATIONS OR OTHER STATE GOVERNMENTAL ACTION IS INVOLVED.

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INTERVENOR-APPELLANTS' EMERGENCY BY PASS APPLICATION FOR LEAVE TO APPEAL BEFORE COURT OF APPEALS DECISION

Oral argument requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASELAW

STATUTES

RULES OF COURT

OTHER

ORDERS APPEALED FROM AND RELIEF SOUGHT

Intervenors/Appellants appeal from two orders of the Court of Claims (COC). The first was issued on May 14, 2020, and denied our Motion to Intervene in this litigation, but allowed us to be received as *amici curiae.* Order 1, herein. No hearing preceded that Order. The second is the Opinion and Order as to which the Legislature appeals, issued on May 21, 2020. Order 2, herein. The Legislature has already filed the transcript of the one, May 15, 2020 hearing.

Intervenors/Appellants seek reversal of both COC Orders, and seek this Court's decree that, first, in deference to the Legislature's contention, the contested Emergency Orders (EO's) and Stay at Home Orders (SHO's) are invalid as to their geographic reach, and, second, they are also invalid as to their asserted subject matter, an epidemic.

STATEMENT OF QUESTIONS PRESENTED

Did the Court of Claims abuse its discretion in refusing to allow Intervenors permissive intervention?

Intervenors/ Appellants say "Yes"
The Court and pre-existing parties said "No"

Did the 1945 Act, a/k/a/ the EPGA, empower Michigan governors to act unilaterally and in a geographically and temporally unlimited way to the outbreak of any disease?

Intervenors/ Appellants say "No"
The Legislature is unclear on the issue
The Governor and Court of Claims say "Yes".

REASONS TO GRANT EMERGENCY BYPASS

This litigation seeks to bring an end to an illicit[1] state of affairs under which the Governor has been invalidly exercising "emergency" powers under a 1945 statute, the EPGA, that she errantly claims empowers her to lock down the state's economy and 9 million citizens, including 35,000 Michigan lawyers, to cope with the current outbreak of the Covid-19 disease. Under Order 1, the COC denied Intervenors/Appellants the ability to advance our case to be free of these contested EO's. Under Order 2, it ruled that the EO's, and their many successors, are authorized by the 1945 statute. In effect, the COC gave the Governor leave to proceed with these arbitrary lockdowns indefinitely, throughout this state.

This action contests the validity of the Governor's various quasi-legislative acts, both as to their statutory and constitutional validity. MCR 7.305(B)(1) and (4)(b). Since the contested EO's disrupt the personal and professional lives of millions of Michiganians, this dispute is plainly one of "significant public interest" and has major significance to the state's jurisprudence". MCR 7.305 (B) (3). Any further delay will harm Intervenors, and their clients, particularly in that the contested EO's have the ongoing effect of largely closing Michigan's courts and law offices until some future indefinite date, which continues to be extended. MCR 7.305 (B)(4)(a). Thus, Intervenors ask this Court to accept and expedite this case, to the end that it declares that the Governor's EO's and SHO's, which purport to be authorized by the EPGA, are not in fact authorized by said statute, and it confers no powers in the face of an epidemic, and cannot constitutionally delegate the powers currently being exercised by the Governor.

[1] This state of affairs is illicit not only because the Governor lacks authority to issue the orders she now issues, but that she has apparently successfully enlisted the aid of the State Bar of Michigan (SBM) to obscure this fact. As these pleadings were being prepared, the SBM triumphantly announced that they had interceded on Michigan's' lawyers' behalf to secure an indulgence, as they described EO-2020-96 FAQ's, discussed in greater depth, below.

STANDARDS OF REVIEW

As briefed below, the Court of Claims' Oder 1 is subject to review for abuse of discretion. Order 2, being a matter of constitutional and statutory construction, is reviewed *de novo* for error. *Michigan Department of Transportation v Tomkins,* 481 Mich 184 (2008); *Petition of Cammarata,* 341 Mic 528 (1954).

ARGUMENT

I. ORDER 1

A. INTRODUCTION

Intervenors sought and seek leave to participate in this litigation in order to make it clear that, although they continue to generally agree with the Legislature's views that **their** statutory and constitutional prerogatives have been violated by the Governor, it is also important to remember that 35,000 licensed Michigan lawyers, many of whom can easily "socially distance" themselves from staff and occasional[2] visitors alike, and all of whom have clients who need and deserve their attention, also have an interest in being free of unlawful and arbitrary strictures on our personal and professional activities.

This is not to denigrate any number of other professionals whose activities the Governor has also deemed "non-essential" with little in the way of objective standards. It is to remind all parties that the Constitution and laws of Michigan exist in **at least** equal part to protect the private citizens and businesses of this State, not merely to employ public officials and divide turf among them.

Given what transpired before the COC, it is unnecessary for us to repeat the argument that the Legislature advanced, and the COC properly accepted, as to the 1976 Act, defined below. Without doubt, the right result was obtained on that front. The Governor's authority under the 1976 Act expired on April 30, 2020.

However, contrary to what the Legislature plead in response to our Motion to Intervene, the Legislature actually did not advance the argument on our behalf that we sought to have heard with respect to the 1945 Act and, quite frankly, made no discernible effort to advance the notion

[2] The Court may take notice that most of the Governor's EO's concern themselves with a reality of retail stores and gyms that simply have no close analogy in the context of law offices, CPA firms, and the like, i.e. throngs of shoppers, customers and health enthusiasts entering the establishment unannounced, and roaming about more or less freely.

that we, our fellow lawyers, and 9 million fellow residents have presumptive, legitimate rights to be free of the Governor's continuing pattern of arbitrarily and invalidly imposed house arrest[3]. As this Court will note, the COC similarly ignored our argument on the 1945 Act, preferring to solely fence with the Legislature. In that regard, not only was our voice left unheard but, more to the point, a patently errant result came about, one which allows the Governor to restrict our movements and interfere with our service to our clients unilaterally, arbitrarily, and indefinitely.

Therefore, we seek leave from this Court to get a fair hearing and right these wrongs.

B. FACTS

Intervenors are lawyers in good standing in this state. Some are small or solo practitioners. All serve a wide range of clients, in civil and criminal matters, many of which were ongoing when the Governor began asserting the "emergency" powers that produced this dispute. Although we appreciate the orders this Court and others have issued to extend our various deadlines, it remains true that innumerable litigants aren't receiving and won't receive much attention from Michigan's judicial system as long as the contested orders persist. None of our clients have determined that they no longer want their interests protected. However, as made clear by the Governor's EO 2020-70 FAQ's, **she** deems it "reasonable and necessary" that, regardless of how few staff we have come into our offices, how few "in person" encounters we have with anyone, how diligently we wash, mask and distance, and how urgently our clients desire legal advice and representation, our public duty is to tell our clients to stand down, go home, and wash our hands "frequently", until the Governor issues her personal "all clear" at some unknown date in the future.

For the reasons described herein, we beg to differ.

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[3] Lest the wrong impression be drawn, we briefed below that we have no interest in promoting statewide, irresponsible block parties and the like. We simply believe that the time has clearly come for Michigan's businesses to be permitted to resume as close to normal activities are possible. When we can retrieve our boats from our respective marinas is of secondary importance, to us, for now. Apparently, others feel differently.

C. MCR 2.209 (B)

MCR 2.209 (B) permits intervention when the propose intervenors' claim or defense present a common question of law or fact with those presented in the "main action". In this case, the majority of the issues of fact and law advanced in the main action are virtually identical to those presented by us, with the exception that we act in our own right as citizens and licensed professionals whose personal freedom is being infringed by the contested Emergency Orders (EO's) issued by the Governor[4], and whose businesses are being destroyed by them.

As the COC aptly noted, it is generally held that leave to intervene be granted freely, unless doing so would prejudice the existing parties.

The decision to allow intervention of third parties is discretionary. On the other hand, if a party seeking intervention in a lawsuit would be bound by a judgment in that action, or, as a practical matter, the petitioner's ability to protect his interest would be substantially affected by the judgment, the possibility that the judgment would be binding on the petitioner is sufficient to permit intervention. *Karrip v Cannonj,* 115 Mich App 726 (1982). Obviously, neither the Legislature nor the Governor have or will take the position that the COC's decision in this case **didn't** perpetuate the Governor's SHO's or that they **won't** apply to all 35,000 Michigan lawyers. For obvious reasons, neither will argue that **this** Court's decision will leave our rights untouched, either. Hence, Intervenors qualify under the rule and should have been allowed to participate, but for the COC's and existing parties' desire to get to a conclusion that the COC's Order 2 describes as "final", but which she announced at the conclusion of the May 15, 2020 hearing, she and all parties knew full well knew would be appealed to this Court, no matter who "won".

[4] As noted by the Legislature, these now total 100 or more. We contest those which purport to act after April 30, 2020, when, as the COC ruled, the Governor's powers under the 1976 Act (a/k/a "EMA"), expired.

Hence, in reality, no time was actually saved by sidelining Intervenors. Since this Court will issue the truly "final" word on the debate, Intervenors can wait no longer. It has been long acknowledged to constitute an abuse of discretion for a court to deny intervention where the facts clearly disclose common issues of fact and law. *Burg v. B&B Enterprises, Inc.,* 2 Mich App 496 (1966).

II. ORDER 2

A. THE STATUTORY AUTHORITY

It seems conceded that there are only two possible sources of statutory authority for the Governor's numerous contested EO's and other declarations. One is the 1976 Emergency Management Act, MCLA 30.401 et seq, (1976 Act, herein). The other is the 1945 Emergency Powers of Governor Act, MCLA 10.31 et seq, (1945 Act, herein). The COC has correctly ruled that, as of May 1, 2020, the 1976 Act no longer empowers the Governor to act unilaterally as it relates to the Covid-19 epidemic. As we shall again brief herein, in greater detail, she never had **any** actual authority under the 1945 Act, either.

B. STATUTORY INTERPRETATION

Again, we acknowledge and largely agree with the Legislature's briefing on this point. In general, unambiguous statutes are to be enforced as written, without a court substituting its own sense of public policy for that of the Legislature. *Kenneth Henes Special Projects Procurement, Mktg. & Consulting Corp. v. Continental Biomass Indus. (In re Certified Question)*, 468 Mich. 109 (2003). Courts are obliged to avoid interpretations of statutes that would render them unconstitutional or otherwise invalid. *General Motors v Appeal Board of Michigan Unemployment Compensation Commission,* 321 Mich 724 (1948); *Pigorsh v Fahner,* 386 Mich

508 (1972). A statute will only be given an interpretation leading to "mischievous" consequences when none other is possible. *In re Lambrecht,* 137 Mich 450 (1904).

When general, abstract terms are used in a statute, intermixed with more specific terms, the doctrine of *in ejusdem generis* applies to "confine" the interpretation of the general terms by the specific ones, particularly in cases involving penal statutes. *People v Powell,* 280 Mich 699 (1937). Since most of the Governor's EO's purport to carry criminal penalties for behaviors that are not, in general, even arguably objectionable, this rule will be particularly applicable to the analysis of the 1945 Act, below.

If more than one statute arguably relates to the same general topic, they may be considered *in pari materia. Houghton Lake Area Tourism & Convention Bureau v. Wood,* 255 Mich App 127 (2003). The general duty of the court is to harmonize such statutes, giving effect to each, within its scope of reference. *Rowley v. Garvin,* 221 Mich App 699 (1997). However, if harmony is not possible, the later statute controls, or is construed as an exception to or refinement of the older statute. *Detroit Bd. of Education v. Parks,* 417 Mich. 268 (1983). Obviously, if this Court concludes that the subject statutes address **different** topics, like "riots" versus "epidemics", this rule does not apply.

C. THE 1976 ACT

Without question, this statute does empower a governor to react to enumerated events that constitute "disasters" or "emergencies". It expressly lists what kind of events it covers.

MCL 30.402 defines various key terms, which follow:

> **(e)** "Disaster" means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous

> peacetime radiological incident, major transportation accident, hazardous materials incident, **epidemic**, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders.
>
> **(h)** "Emergency" means any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and **the public health and safety**, or to lessen or avert the threat of a **catastrophe** in any part of the state.
>
> **MCLA 30.402. Emphasis added.**

We differ with the COC in that it apparently felt that definitions appearing in the 1976 could be "borrowed" and read into the 1945 Act. **See Order 2, p. 2, fn 1-2.** We know of no authority for this proposition, i.e. that definitions appearing in a later statute can be presumed to be applicable to an earlier statute. Moreover, what becomes clear is that the 1976 Act is the only statute that empowers a governor in the face of an outbreak of **disease,** called an "epidemic" in that Act. The 1945 Act, the Governor's sole source of support under the COC's Opinion, makes no pretense of empowering a governor to exercise **any** unilateral powers in the face of an outbreak of disease, over any area or for any length of time.

D. THE 1945 ACT. MCLA 10.31, et seq

The Governor clearly claims that, because the 1945 Act features no 28 day sunset provision as appear twice in the 1976 Act, she enjoys temporally unlimited powers to issue EO's premised on what she terms as an ongoing "emergency", the Covid-19 epidemic, and the "science" as expounded by various "experts" of her choosing. This claim is inaccurate. The 1945 Act confers no powers on the Governor in the context of this or any epidemic.

By way of preface, the 1945 Act was enacted almost 30 years after the Spanish Flu pandemic. Therefore, it cannot be understood as a hurried response to **that** disease related event, nor can it be thought to have been written without the Legislature's knowing of such things as

epi- and pan-demics. The question is whether the 1945 Act was written to confer emergency powers on Michigan's governors in the face of **epidemics**, outbreaks of communicable disease. A review of The 1945 Act, in light of the above rules of construction and other authority, demonstrates that it does **not** empower a governor in such events, and certainly does not accord governors temporally and geographically unlimited powers in the face of such events.

MCLA 10.31 (1) starts by listing the events that could trigger a governor's emergency powers. It includes such abstract and concrete terms as "crisis", "disaster", "catastrophes" "rioting" or other "similar public emergency", or the reasonable apprehension that such an event may soon occur.

No one claims that the Covid-19 outbreak is anything like a "riot". "Epidemic" isn't a listed triggering event, as it clearly is in the 1976 Act. Neither is "disease". Neither of those events resembles a riot, either. Thus, when seeking to interpret the abstract terms ("crisis", "catastrophe", "similar emergency" and "disaster") the only concrete term, "rioting", must guide the interpretation. *People v Powell,* 280 Mich 699 (1937). This compels the conclusion that, while this epidemic causes what many people could loosely describe as crises of various kinds, and some might find the disease's effects catastrophic, even disastrous, it is not an event of the type which the 1945 Act empowers a governor to exercise extraordinary powers to combat.

Neither do this Court's jurisprudence, nor Black's Law Dictionary of the era (1933 Edition) treat "epidemics" as interchangeable with any of these terms.

1. Catastrophes.

Our research suggests that this term has appeared in 58 opinions of this Court over the past 170 years. It is a term this Court has never used to describe a disease or epidemic, or act as a synonym for either. It **has** used the term in such contexts as "… accidents, fires, **catastrophes**

of nature …" and other events, none being outbreaks of disease. *Swickard v Wayne County Medical Examiner,* 438 Mich 536 (1991).

Turning to Black's Law Dictionary, we have the following:

CATASTROPHE. A notable disaster; a more serious calamity than might ordinarily be understood from the term "casualty." Reynolds v. Board of Com'rs of Orleans Levee Dist., 139 La. 518, 71 So. 787, 791.

CASUALTY. Accident; event due to sudden, unexpected or unusual cause; event not to be foreseen or guarded against; inevitable accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause; as by fire, shipwreck, lightning, etc. Story, Bailm. § 240; Gill v. Fugate, 117 Ky. 257, 78 S.W. 191; Farmers Co-op. Soc. No. 1 of Quanah v. Maryland Casualty Co., Tex.Civ.App., 135 S.W.2d 1033, 1036.

2. Crises.

This term appears in 134 opinions over the same time period. As one might expect, it has been used to describe all manner of awful events, ranging from depressions, to prison overcrowding to a perceived glut in medical malpractice lawsuits. It has, to our knowledge, **never** been used as a definition or synonym for "disease" or "epidemic". Oddly, Black's did not include a definition of this term in its 1933 Edition.

In comparison, in *Peden v. City of Detroit,* 470 Mich 195 (2004) this Court tellingly used the term in the following context:

> ... Detroit police officers, including those who need not regularly engage in patrol functions, must be constantly capable of performing those functions during times of **riots or crises** , or special circumstances, such as the recent electrical blackout or, more predictably, during large special event gatherings, such as the Detroit Thanksgiving Day parade ...
> 470 Mich @ ____ (emphasis added)

3. Disasters.

This term appears in fully 196 opinions over the same 170 plus years. These include lots of train wrecks, derailments, and trains accidentally killing unwary pedestrians. Fires, floods, tornadoes and the entire range of meteorological maladies to which Michigan is famously subject

are all represented. Every industrial accident one could imagine, too, and a surprising number of people falling down elevator shafts. But not once is the word used as a synonym for "disease" or "epidemic".

In 1986, this Court ruled on the then governor's reaction to prison overcrowding under the "civil defense and **disaster** control act", but never opined that the act also empowered the governor to take charge in the case of disease. *Kent County Prosecutor v Kent County Sheriff,* 425 Mich 718 (1986). Indeed, over a century ago, this Court even managed to poetically weave this term into the review of a divorce judgment.

> ... the opposite sex is manifestly fervent but extremely migratory. Neither comes before the court with clean hands, and neither presents any claim for relief from nuptial **disaster** which specially appeals to the tender consideration of a court of equity. ...
>
> *Tisman v Tisman,* 176 Mich 94 (1913)

Black's Law Dictionary reveals the closest miss we could find, and even that did not involve a **communicable** disease.

> DISASTER. A sudden and ruinous misfortune, hence, one who had been pronounced by eminent physicians to be afflicted with dementia praecox, who had nervous breakdown, and who was without funds or ability to earn them by either mental or physical exertion, was overtaken by disaster. Robison v. Elston Bank & Trust Co., 113 Ind. App. 633, 48 N.E.2d 181, 188.

4. Emergency.

This most generic and ubiquitous of the terms appears in over 1400 opinions, 92 of which also include the word "disease". In the 1945 Act, it follows and is expressly limited by the term "similar", which word refers back to "rioting". MCLA 10.31 (1). Hence, at first blush, the term "emergency", as used in the 1945 Act, is the term **least** susceptible to being interpreted to include diseases or epidemics. *People v Powell,* 280 Mich 699 (1937).

Black's law Dictionary reveals **no** connotation of communicable disease or epidemic, especially one that, given the Governor's latest SHO's, and her public comments noted by the Legislature, seem fated to affect us, in one form or another, for months[5] to come.

> EMERGENCY. A sudden unexpected happening; an unforeseen occurrence or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. A relatively permanent condition of insufficiency of service or of facilities resulting in social disturbance or distress. Kardasinksi v. Koford, 88 N.H. 444, 190 A. 702, 703, 111 A.L.R. 1017; Contract Cartage Co. v. Morris, D.C.I11., 59 F.2d 437, 446; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 843, 71 A.L.R. 161. "Emergency" in sense of constitutional provision respecting referendum does not mean expediency, convenience, or best interest. State v. Hinkle, 161 Wash. 652, 297 P. 1071, 1072.

Two of this Court's opinions published nearly a century ago **do** mention a link between disease and emergency. In the process, they also reveal an additional, compelling reason to **know** that the Governor's claim that the 1945 Act empowered **her** to act unilaterally and eternally to bring this disease to heal (no matter how long millions of us are kept under house arrest), is a cynical, blatant canard. The history of public health legislation in Michigan belies it.

In *Rock v Carney,* 216 Mich 280 (1921), this Court reviewed the actions of **local** "public health officials" who forcibly examined and quarantined a young woman who had contracted two venereal diseases. In *Rock*, this Court acknowledged the broad statutory "emergency" powers delegated to **local** public health officials to intercede to contain the spread of "communicable" diseases, in cooperation with the State Board of Health**,** under a **1915 precursor to our current Public Health Code. 1 Comp. Laws Sect. 5018-5055 (1915).** 216 Mich @283-288. This arrangement, statutory authority being delegated to **local** public health officials to combat outbreaks of diseases/ epidemics, was modified over the following decades, but remained largely intact until, in 1978, the Public Health Code was overhauled. MCLA 333.1101, et seq.

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[5] If this process includes awaiting a reliable and proven vaccine, it may take **years.**

Parts 51 and 52 of said 1978 Code are particularly pertinent to the powers under discussion, and reveal a governor's largely **non-existent** statutory role in preventing the spread of communicable diseases ordained therein. MCLA 333.5101-.5267. Obviously, 1945 falls between 1915 and 1978 in history. Thus, **if** the 1945 Act was actually intended to break form and authorize the **governor** to supersede the authority of local public health officials in the face of epidemics, one would certainly expect the Legislature to have at least **mentioned** the existing statutory schema that was being modified, and the fact that local public health officials, who had been designated to handle these events for decades, were being **supplanted by a governor.** But nothing of this sort appears anywhere in the 1945 Act. No mention of existing public health laws appears. Indeed, as of the 1978 Public Health Code, the allocation of responsibility and authority remained decidedly **elsewhere.**

Why? Because, as the Legislature has suggested and we have maintained outright, the 1945 Act had nothing whatsoever to do with disease, epidemics, or public health, and conveyed **no** power to **any** governor to take charge of these challenges to public health, neither unilaterally nor indefinitely. The 1945 Act was, as the Legislature has briefed, about **riots.**

In 1926, in *Kehoe v Board of Auditors,* 235 Mich 163 (1926), this Court revisited this same statutory schema in a slightly different context, in reference to a slightly different disease, smallpox. Once again, this Court acknowledged the clear statutory authority of **local public health officials** to coordinate the localities' reactions to outbreaks of communicable disease.

Hence, these two precedents, decided after the Spanish Flu pandemic, reveal this Court's early and clear acknowledgment that, throughout the 20th Century, it was **local public health officials** who held the statutory "emergency" power to combat outbreaks of disease, and, preferably, to keep these outbreaks from becoming epidemics. Nothing in the 1945 Act **claims** to change that allocation of power and responsibility. It did not. As of 1945, the field that the

Governor now seeks to preempt had been occupied by legislatively deputized local public health officials for many decades. Not until 1976 was any governor accorded any relevant emergency powers, subject to the familiar 28 day sunset clauses, etc.

As such, as attractive as it now is to the Governor, having no frustrating sunset provisions to contend with, and no requirement to ever submit her plans to the Legislature's prerogatives, the 1945 Act is utterly inapplicable to the current Covid 19 situation, and serves as no excuse for any Michiganian to be currently subject to any SHO.

5. Continuing Analysis of the 1945 Act

Each provision of the 1945 Act only serves to reinforce the above. The 1945 Act describes the people who can seek a governor's emergency intervention. The list is short: mayors, county sheriffs, or the state police. MCLA 10.31(1). Clearly, these officials are largely tasked to fight crime, not disease. Conversely, the statute doesn't authorize **any** public health official to seek these emergency orders, or take any actions to guard the public **health**. Thus, again, it is implausible to claim that the 1945 Act was actually intended to modify the existing public health code and empower a governor to react to outbreaks of disease, to supplant local pubic health officials who had played that role at least as far back as 1915. It is doubly implausible to assume this application to outbreaks of disease when one notes that it could be triggered by local or state officials having little or nothing to do with public health, and acknowledges **no** role for Michigan's entire private and public medical communities, and public health officials. This passage thus reveals that the emergency powers enacted in 1945 were geared to helping local law enforcement cope with outbreaks of localized crime and violence, not outbreaks of disease.

The 1945 Act then authorizes the governor to "designate the area involved". MCLA 10. 31(1). Contrary to the Governor and COC's take on it, this language does **not** readily indicate or

suggest that this "area" can include the entire state[6]. Instead, as the Legislature has briefed, the context strongly implies that the "area" is a defined geographical **part** of the state where the "rioting or other similar emergency" is actually happening, or foreseen.

Next, the statute authorizes the governor to issue orders that are objectively reasonable, and that the governor subjectively believes to be "necessary" to protect life, property, and to diffuse the emergency "within the affected area". MCLA 10. 31(1). Certainly, life and property are endangered by events like riots, looting and the like. Life is also endangered by diseases. Property generally is not. So, the Governor's interpretation is only plausible if one overlooks the fact that terms like "disease", "epidemic" and "public health" don't appear anywhere in this statute.

Next comes the authorization of the types of topics emergency orders may address. MCLA 10.31(1). They include "control of traffic", which certainly would include forbidding people from driving to or from the places where fires are burning or rioting and looting are going on, but doesn't readily appear to include "every place in Michigan except your own garage, driveway, or stretch of street between your house and the pet supply shop". The one time, prior to this year's outbreak of litigation, this statute was addressed by this Court, it was neither asked to so expansively read this sentence, **nor did it**. *Walsh v River Rouge,* 385 Mich 623 (1971).

The 1945 Act also permits the governor to designate buildings in "the affected area" that people could not enter, leave or use. In the context of riots and **looting**, this makes obvious sense. However, no governor before this one has urged the courts to read this passage to allow a statewide house arrest, essentially turning the concept on its ear. Now, we are told, this phrase means that, not only can a governor forbid people from entering certain stores and buildings in certain distressed areas, it also empowers governors to order that more than 9,000,000 people

[6] The inanity of locking down the entire UP as though it was one large dive bar on Eight Mile Road is self-evident, and a perfect illustration of the point.

cannot leave **one building,** their respective homes. The 1945 Act also allows gubernatorial orders to control "places of amusement", which, again, more readily connotes clubs and bars than every "nonessential" business in the state, and even some of the "essential" ones. It would surely make news to have law offices legally classified as "places of amusement."

The 1945 Act does permit some control over pubic assembly in **public** places, which, given the First Amendment, carries with it certain obvious limitations. It does **not** say anything about governors micro-managing how many guests one may have over to socialize at one's home, or come to one's private office to consult about a lawsuit, craft a will and trust, etc. It has **no** apparent application to regulating how one navigates a golf course. The 1945 Act allows establishing a "curfew", which, once again, has a clearly understandable application in the context of riots and looting, but has never, until lately, been interpreted to mean anything so grandiose as "everybody go home … and stay there!"

The 1945 Act also allows control of alcoholic beverages which, like marijuana, the current Governor has taken pains **not** to limit. In the context of the heated tempers and short fuses one readily associates with riots, this provision again makes obvious good sense. Ironically, **not** cutting off intoxicants and recently de-criminalized "essential" substances **only** makes perverse sense if the goal is to prolong the shutdown but pacify the citizenry, not solve the real "emergency".

Finally, the 1945 Act permits limitations on explosives and flammable liquids. These are easy to understand terms. Pipe bombs and Molotov cocktails. Items which have no discernible relevance to epidemics, but are *de rigeur* when riots break out.

Still, not a single mention of "disease", "epidemic" or "pandemic" appears.

MCLA 10.31 (2) doesn't add much to understanding what kind of events governors can treat as "emergencies". It does make it clear that, as to "emergencies" legitimately within its

scope, these Emergency Orders (EO's) can last as long as the governor sees fit, and no other branch of Michigan government can intervene. In truth, there seems nothing to bar a retiring governor from issuing an order leaving control of an endless "emergency" he or she announced early in his/her term to his or her successor, thus introducing the vague and distinctly non-republican whiff of hereditary monarchy into the equation.

MCLA 10.31 (3) disallows gun-grabbing, which obviously has a lot to do with the Second Amendment, but nothing discernible with fighting enemies like exotic viruses.

Nothing in this Act describes a governor getting input from public health officials, diagnostic medical testing, drugs, medical "modeling", "public health", "public health care systems" or anything else that would suggest that this 1945 statute was intended to authorize "emergency" lockdowns of people and businesses to slow the spread of **any** disease. It doesn't even mention hospitals. Or "science".

MCLA 10.32 provides for broad interpretation of the statute, to allow governors to do what is needed to diffuse emergencies **actually envisioned by the statute**. Of course, if infectious disease outbreaks are **not** such "emergencies", even the broadest interpretation won't sustain this governor's orders. This section references "the police power of the state". It doesn't mention "infectious diseases" nor "contagions" nor public health crises, anywhere.

In all, it requires a powerful stretch of willed **mis-**interpretation to conclude that, in 1945, the Legislature empowered Michigan's governors to unilaterally displace the state's entire existing, locally controlled public health apparatus, and the Legislature itself, to indefinitely place the entire state under house arrest, including all its practicing lawyers, to fight a disease that is largely concentrated[7] within 60 miles of downtown Detroit. In fact, the word "quarantine" doesn't appear anywhere in the 1945 Act, either.

[7] As of 5/5/2020, per the state's website, 69% of Michigan's 44,397 total cases, and 80% of its 4,179 fatalities, were found in Wayne, Oakland and Macomb Counties.

It is thus clear that **none** of the current Covid-19 SHO's and similar EO's that infringe on millions of people's right to socialize, conduct business and hold their jobs, are actually authorized by The 1945 Act, because that statute was never intended to authorize gubernatorial interventions of a mandatory nature to curb the spread of **any** disease.

Further, if the1945 Act could be read as the Governor insists, these statewide lockdowns could be unilaterally enacted by any governor any time the cold and flu season appeared to be waxing. For that matter, there is no provision in The 1945 Act for any other branch of Michigan Government to intervene, hopefully on the quarantined citizenry's behalf[8]. Michigan's governors would have plenary, unlimited, dictatorial powers at their fingertips, simply by declaring that an outbreak of any one of many common infectious diseases constituted an "emergency". As the Legislature has briefed, and we concur, this would be an absurd and plainly unconstitutional reading of The 1945 Act, one which this Court is obliged to avoid. *General Motors v Appeal Board of Michigan Unemployment Compensation Commission,* 321 Mich 724 (1948); *Pigorsh v Fahner,* 386 Mich 508 (1972).

III. THE CONTESTED EO'S

Given the above, the analysis of the Governor's contested EO's d SHO's becomes fairly straightforward, if complicated by the fact that she has issued dozens of them since suit was commenced, and they now total 100 or more, not counting the accompanying "FAQ's". However, the above analysis applies to each of them that purports to restrict the liberty and business activities of any Michiganian after April 30, 2020.

EO 2020-66 provides occasion for special comment though. In it, the Governor grudgingly concedes the point that, under the 1976 Act, a governor cannot exceed 28 days of

[8] Intervenors cannot help but observe that this debate, as briefed by both the Governor and Legislature, uncomfortably resembles two wolves, standing near sheep (the rest of us) and discussing what to have for dinner!

emergency orders without the Legislature's approval. As far as the Governor's prefatory comments in the EO, we will offer a few observations, to the extent they relate to the 1976 Act.

Under The 1976 Act, and, as the Legislature has briefed, the Constitution, if a governor wishes to acquire power for more than 28 days, it is the duty of a governor to essentially "make the case" for prolonging the governor's emergency powers to the Legislature's satisfaction. In the legal world, "making a case" requires considerably more than the bald assertion that un-named "public health experts" have been consulted. It requires more than vague references to "some counties" experiencing spikes in new cases. And, with due respect, the Governor's honest admission as to the enormous and growing economic harm caused by her various lockdown orders hardly "makes the case" for continuing them indefinitely, to one degree or another, all over the State.

It is also well to note that Florida, a state with at least twice the population of Michigan, and storied for its large senior population, had, as of May 1, 2020, confirmed roughly 8,000 fewer cases than we have in Michigan, and suffered a third of the deaths we have, **without** imposing a statewide lockdown. Hence, bald assertions that open-ended SHO's are the one and only “scientific” way to protect Michigan's public health cannot be taken at face value, nor accorded reflective approval under the "rational relation" test.

EO 2020-100 purports to extend the Governor's prior SHO's, as amended, to June 12, 2020, at which point these SHO's will be nearly three months old, and unauthorized by the 1976 Act since May 1, 2020. Nowhere in EO-2020-100 does the Governor promise that June 12, 2020 will be the end of these SHO's. To the contrary, she purports to empower **subordinate** executive branch agencies to continue to act under the Governor's "delegated" authority up to 90 days **after** any state of emergency or disaster ends, i.e. into September, 2020, if not later. Obviously, this

Order has no more statutory or constitutional validity than the others referenced herein. It also amounts to **two** levels of legislatively unauthorized law-making activity.

As it relates to Intervenors, though, these EO's and SHO's suffer from the additional flaw of being patently arbitrary, and endangering a traditional right of citizens everywhere, the right to obtain legal counsel in the face of the transactions and legal disputes they encounter. For example, EO 2020-70 allows for real estate agents to resume most of their activities, which almost inevitably involve personal contact with people who are not members of the realtors' households, but does not allow lawyers to return to their offices, even if they work alone, or employ only family members. In fact, the risk to public health posed by small firm and solo lawyers who observe all the mask-wearing, hand-washing and standing far away from others referenced throughout the Governor's many edicts must almost certainly be smaller than those presented by realtors, lawn crews, marijuana dispensers, workers at laundromats and motels, bicycle repairmen, golf course cashiers, everyone at Uncle Ed's and Jiffy Lube, and so on. Yet, as asserted in the Governor's EO 2020-70 and -96 FAQ's, when lawyers, in the service of their clients, leave home to go to their offices, they become potential criminals.

To further illustrate this absurdity, and our earlier comment about the Governor and the SBM, **EO 2020-97** (May 21, 2020) lists the protocols that "offices" must follow when re-opening. They contain distancing, face covering, and other cleanliness related requirements that any law office can plainly satisfy. Yet, in her **EO-2020-96 FAQ's**, issued the same day, the Governor makes it clear that, among "offices", **law** offices are not as presumptively free as others are to open, for no apparent legal reason. This is patently absurd, particularly since every SHO the Governor has issued explicitly disclaims the intent to interfere with the operation of the State's judicial system. **See EO-2020-70, para. 17, for example**. How that can be accomplished when 35,000 officers of said courts are effectively under "soft" house arrest, given

the Sophie's Choice of, on one hand, risking suits for malpractice or grievances for "neglecting" client business, and, on the other, being charged with a misdemeanor if someone **else** decides that they were a tad too diligent in going to the office to serve their clients on a given day, is a daunting question.

As the Legislature has more fully briefed, managing the Covid-related emergency/disaster under the Michigan Constitution and only relevant statute, the 1976 Act, requires the Governor and Legislature to act on a collaborative basis that one would hope, would focus on how to restore the people of this State to their prior levels of social and economic liberty and freedom as soon as possible. Simple principles of republican governance would also dictate that, instead of invoking un-named and unelected "experts", the government officials who would limit the freedoms and activities of their fellow citizens must explain in all open detail what situations require these restrictions, where they require these restrictions and to what extent, and how the government plans to remove them, **with all deliberate speed.** At the very least, the people who would wield these powers must be elected officials, accountable to the people at the ballot box, not invited guests on this year's version of the proverbial Blue Ribbon Panel. What we have received from our Governor so far falls far short of such openness and legal humility.

IV. CONCLUSION

"The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Township of Lake v Millar,* 257 Mich 135 (1932). As such, in the absence of a new legislative endorsement under The 1976 Act, the Governor's contested EO's have no legally binding force as to any Michigan resident, or business, including Intervenors and their clients. This is not to suggest that, when faced with similar challenges in the future, Michigan's governor will be powerless to act swiftly to stabilize the situation. It merely means tat, as the 1976 Act wisely

provides, the time allotted to unilateral action is limited, after which the more normal collaborative governing processes must resume, for the benefit of all of the citizenry.

May 27, 2020

Respectfully Submitted,

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Pro se

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APPENDICES

1945 Act

Order 1

Order 2

May 15, 2020 transcript

EO 2020-66

EO 2020-70

EO 2020-70 FAQ's

EO-2020-96 FAQ's

EO 2020-97

EO 2020-100

Act 302 of 1945 Emergency Powers of Governor

AN ACT authorizing the governor to proclaim a state of emergency, and to prescribe the powers and duties of the governor with respect thereto; and to prescribe penalties.
The People of the State of Michigan enact:

§ 10.31. Proclamation of state of emergency; promulgation of orders, rules, and regulations; seizure of firearms, ammunition, or other weapons.

Sec. 1.

(1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

(2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

(3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

§ 10.32. Construction of act.

Sec. 2.

It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.

§ 10.33. Violation; misdemeanor.

Sec. 3.

The violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor.

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

v

GOV. GRETCHEN WHITMER

Case No. 20-000079-MZ **Hon. Cynthia Diane Stephens**

ORDER

At a session of said Court held in,
Detroit, Wayne, Michigan, on

_____

The Court has received a single Motion for Intervention on behalf of John F. Brennan, Esq., Samuel H. Gun, Esq., Eric Rosenberg, Esq., Mark Bucchi, Esq., and Martin Leaf, Esq. The Plaintiff purports to take no position but both iterates a concern about delay being occasioned by such intervention and asserts that the positions articulated by the intervenors are adequately represented. The Defendant has opposed intervention.

"The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492 (1996). However, intervention may be improper where it would have the effect of delaying the action or producing a multifariousness of parties and causes of action. *State Treasurer v Bences*, 318 Mich App 146, 150 (2016), quoting *Hill v L.F. Transp., Inc., 277 Mich App 500, 507* (2008) (citations ad quotation marks omitted). In this case, the putative intervenors echo much of the argument offered in support of the plaintiffs' case and additionally present either an "as applied" challenge to the scope of the executive orders as they affect lawyers and litigants. The focus of the case pled by plaintiff's is on an assertion that the Governor is without authority to act as she has under the Michigan Constitution, 1976 Emergency Management Act ("EMA"), MCL 30.401—.421; or the 1945 Emergency Powers of Governor Act ("EPGA"), MCL 10.31—.33; or that the EPGA itself is unconstitutional. Those issues are adequately represented by the plaintiffs. The distinct issues of whether any, all, or some of the executive orders impermissibly infringe on the rights, duties or privileges of attorneys or their clients is not the focus of this case and would be better framed in a separate action. Additionally, this matter is emergent and affording party status to these putative plaintiffs would delay resolution.

IT IS HEREBY ORDERED THAT the Motion to Intervene is DENIED.

Additionally, the Court has received requests to file amicus curiae briefs from:

1. Michigan House Democratic Leader Christine Greig and The House of Democratic Caucus
2. Michigan Senate Democratic Caucus
3. Professor Richard Primus
4. 41 Healthcare Professionals
5. Michigan Nurses Association
6. Michigan United for Liberty
7. The Mackinac Center for Public Policy

One amicus request, made by "41 Healthcare Professionals" has been submitted with the consent of the parties to this case.

IT IS ORDERED THAT the Court will **Accept** all amici briefs listed above and any other amicus brief filed on or before 5:00p.m., May 14th, 2020. However, the amicus counsel will not participate in oral argument. Additionally, the brief filed by the rejected proposed intervenors will be accepted as an amicus brief.

The hearing will be livestreamed on the Court of Claims YouTube channel via the following link: https://www.youtube.com/channel/UCIUqxv2vFaEavHwIPryMriA. Availability to this link begins Friday, May 15th, 2020 at approximately 9:50a.m.

Date: May 14, 2020

Judge Cynthia Diane Stephens
Court of Claims

A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

Date

Clerk

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES, and MICHIGAN SENATE,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000079-MZ

Hon. Cynthia Diane Stephens

This matter arises out of Executive Orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Neither the parties to this case nor any of the amici deny the emergent and widespread impact of Covid-19 on the citizenry of this state. Neither do they ask this court at this time to address the policy questions surrounding the scope and extent of contents of the approximately 90 orders issued by the Governor since the initial declaration of emergency on March 10, 2020 in Executive Order No. 2020-4. The Michigan House of Representatives and the Michigan Senate (Legislature) in their institutional capacities challenge the validity of Executive Orders 2020-67 and 2020-68, which were issued on April 30, 2020. They have asked this court to declare those Orders and all that rest upon them to be invalid and without authority as written. The orders cited two statutes, 1976 PA 390, otherwise known as the Emergency Management Act (EMA); and 1945 PA 302, otherwise known as the Emergency Powers of Governor Act (EPGA). In addition, the orders cite Const 1963, art 1, § 5, which generally vests the executive power of the state in the Governor. This court finds that:

1. The issue of compliance with the verification language of MCL 600.6431 is abandoned.
2. The Michigan House of Representative and Michigan Senate have standing to pursue this case.
3. Executive Order 2020-67 is a valid exercise of authority under the EPGA and plaintiffs have not established any reason to invalidate any executive orders resting on EO 2020-67.
4. The EPGA is constitutionally valid.
5. Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA.

I. BACKGROUND

The Court will dispense with a lengthy recitation of the pertinent facts and history and will instead jump to the Governor's declaration of a state of emergency[1] as well as a state of disaster[2] under the EMA and the EPGA on April 1, 2020, in response to the COVID-19 pandemic. Executive Order No. 2020-33. Both chambers of the Legislature adopted Senate Joint Resolution No. 24 which approved "an extension of the state of emergency and state of disaster declared by Governor Whitmer in Executive Order 2020-4 and Executive Order 2020-33 through April 30, 2020. . . ." The Senate Concurrent Resolution cited the 28-day legislative extension referenced in MCL 30.403 of the EMA.

[1] The EPGA does not define the term "state of emergency." However, the EMA defines the term as follows: "an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(q).

[2] While the EPGA does not use, let alone define, the term "state of disaster," the EMA defines the term as "an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p).

The public record affirms that the governor asked the legislative leadership to extend the state of disaster and emergency on April 27, 2020. The Legislature demurred and instead passed SB 858, a bill without immediate effect, which addressed some the subject matter of several of the COVID-19-related Executive Orders, but did not extend the state of emergency or disaster or the stay-at-home order. The Governor vetoed SB 858.

On April 30, 2020, the Governor issued Executive Order 2020-66 which terminated the state of emergency and disaster that had previously been declared under Executive Order 2020-33. The order opined that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, *and the disaster and emergency conditions it has created still very much exist*." Executive Order No. 2020-66 (emphasis added). However, EO 2020-66 acknowledged that 28 days "have lapsed since [the Governor] declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33." *Id.* The order declared there was a "clear and *ongoing* danger to the state . . . ." (Emphasis added).

On the same day, and only one minute later, the Governor issued two additional executive orders. First, she issued Executive Order No. 2020-67, which cited the EPGA. [In addition, the order contained a cursory citation to art 5, § 1.] EO 2020-67 noted the Governor's authority under the EPGA to declare a state of emergency during "'times of great public crisis . . . or similar public emergency within the state. . . .'" *Id*. quoting MCL 10.31(1). The order noted that such declaration does not have a fixed expiration date. *Id.* Then, and as a result of the ongoing COVID-19 pandemic, EO 2020-67 declared that a "state of emergency remains declared across the State of Michigan" under the EPGA. The order stated that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id*. The order was to take immediate effect. *Id*.

In addition to declaring that a state of emergency "remained" under the EPGA, the Governor simultaneously issued Executive Order No. 2020-68; this order declared a state of emergency and a state of disaster under the EMA. [In addition, like all previous orders, the order contained a vague citation to art 5, § 1 as well.] Hence, EO 2020-68 essentially reiterated the very same states of emergency and disaster that the Governor had, approximately one minute earlier, declared terminated. The order declared that the states of emergency and disaster extended through May 28, 2020 at 11:59 p.m., and that all orders that had previously relied on the prior states of emergency and disaster declaration in EO 2020-33 now rest on this order, i.e., EO 2020-68.

The House of Representative and the Senate subsequently filed this case asking for an expedited hearing and a declaration that EO 2020-67 and EO 2020-68, and any other Executive Orders deriving their authority from the same, were null and void.

COMPLIANCE WITH MCL 600.6431

The Governor noted in her reply brief that the complaint, as originally filed in this court did not meet the verification requirement of MCL 600.6431(2)(d). At oral argument the Governor acknowledged that the verification requirements were not met when the complaint was originally filed; however, a subsequent filing was notarized in accordance with the statute. The Governor also acknowledged that the failure to sign the verified pleading before a person authorized to administer oaths was not necessary for invoking this Court's jurisdiction. Finally, the Governor agreed that she was not seeking dismissal of the action based on plaintiffs' initial lack of compliance. For those reasons this Court will consider the issue moot and decline any analysis of the arguments predicated on MCL 600.6431.

STANDING

The issue of standing is central to this case as it is with all litigation. Courts exist to manage actual controversies between parties to whom those controversies matter. The Legislature has cited MCR 2.605 in support of its standing to pursue this declaratory action. The Legislature asserts that it has a need for guidance from this Court in order to determine how it will proceed to protect what it articulates as its special institutional rights and responsibilities. The Governor challenges whether the Legislature has standing to bring this suit. The Governor argues that the institution of the Legislature has no more interest in the outcome of this suit than any member of the public. She further claims that the Legislature does not need the guidance of the Court to determine how to carry out its constitutional duties. It is the opinion of this Court that the Legislature has standing to pursue its claims before this Court.

Both parties cite the seminal case on the issue of standing, *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In that case, the Supreme Court refined the concept of standing under the Michigan Constitution. In doing so, the Court rejected the federal standing analysis and articulated an analytical framework rooted the Michigan Constitution. The *Lansing Schs Ed Ass'n* Court looked to whether a cause of action was authorized by the Legislature. Where the Legislature did not confer a right to a specific cause of action, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different than the citizenry at large . . . ." *Id*. at 372.

The Governor relies heavily on the recent case of *League of Women Voters of Mich v Secretary of State*, __ Mich App __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), which is itself now on appeal to the Michigan Supreme Court. That case, similar to the instant case, was brought under the aegis of MCR 2.605 and asked the court to declare that an Attorney General Opinion's interpretation of a statute was invalid. The Court of Appeals majority in *League of*

Women Voters examined the issue through the lens of MCR 2.605 and found that in that case the institution of the Legislature had no standing: "Given the definition of 'actual controversy' for the purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgement is necessary to guide the Legislature's future conduct in order to preserve its legal rights." *Id*., slip op at p. 7.

League of Women Voters was the first examination of the issue of institutional standing in Michigan. For that reason, the court focused on the logic of the Supreme Court's decision in *Dodak v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993), which analyzed a standing issue in relation to individual legislators. *Dodak*, like this case, presented a conflict between the executive and legislative branches of state government. That Court, like this one, is mindful that in such instances the issue of legislative standing requires a litigant to overcome "a heavy burden because, courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *League of Women Voters*, __ Mich App at __, slip op at p. 8 (citation and quotation marks omitted; cleaned up). There must be a "personal and legally cognizable interest peculiar" to the legislative body, rather than a "generalized grievance that the law is not being followed." *Id*. (citations and quotation marks omitted). In *Dodak* four legislators pressed a case concerning what they asserted was an abrogation of their individual rights as members of the appropriations committees when the State Administrative Board was allowed to redistribute funds allocated by the Legislature between departments of state government. Ultimately the Supreme Court found that the chair of the appropriation committee did in fact have a peculiar and special right and a potential for a personal injury sufficient to acquire standing. In *Dodak*, 441 Mich at 557, the Supreme Court cited with approval federal authorities holding that an individual legislator "'only has standing if he alleges a diminution of congressional influence

which amounts to a complete nullification of his vote, with no recourse in the legislative process.' Dodak, 441 Mich at 557, quoting *Chiles v Thornburgh*, 865 F3d 1197, 1207 (CA 11, 1989). In *League of Women Voters* the institution claimed its right was to have a constitutionally correct interpretation of certain legislation. The *League of Women Voters* Court found that indeed every citizen had such a right and the Legislature once it enacted a statute had no special relationship to it. *League of Women Voters*, __ Mich App at __, slip op at p. 8. The case did not, remarked the Court, concern the validity of any particular legislative member's vote. *Id*.

While it is a close question, this Court finds that the issue presented in this case is whether the Governor's issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster. The United States Court of Appeals for the Sixth Circuit recently found that a legislative body under certain circumstances does have standing. See *Tennessee General Assembly v United States Dep't of State*, 931 F3d 499 (CA 6, 2019). The logic of their analysis is persuasive and compatible with both *Dodak* and *League of Women Voters*. In *Tennessee General Assembly*, the Sixth Circuit surveyed two cases from the Supreme Court of the United States to illustrate when a legislative body, or portion thereof, may have standing. *Id*. at 508, citing *Coleman v Miller*, 307 US 433; 59 S Ct 972; 83 L 3d 1385 (1939); and *Ariz State Legislature v Ariz Independent Redistricting Comm*, __ US __; 135 S Ct 2652; 192 L Ed 704 (2015). Surveying *Coleman* and its progeny, the Sixth Circuit explained that, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Tennessee General Assembly*, 931 F3d at 509 (citation and quotation marks omitted). The Sixth Circuit further noted that *Arizona State Legislature* Court also conferred standing under article III to a legislature. In

that case, the legislature claimed that the power to redistrict accrued to them under the Arizona constitution. The challenged action in that case was "more similar to the 'nullification' injury in *Coleman*." *Tennessee General Assembly*, 931 F3d at 510, citing *Arizona State Legislature*, __ US at __; 135 S Ct at 2665. To that end, the proposal at issue would have completely nullified any legislative vote, and there was "a sufficiently concrete injury to the Legislature's interest in redistricting . . . that the Legislature had Article III standing." *Id*., citing *Arizona State Legislature*, __ US at __; 135 S Ct 2665-2666.

The injury claimed in this case is that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster. The Legislature claims this right is exclusively theirs as an institution under the EMA and this state's Constitution. Understanding that *Lansing Schs Ed Ass'n* specifically departed from the Article III analysis of its predecessor cases, the nullification argument is nevertheless not incompatible with the *Lansing Schs Ed Ass'n* focus on "special injury." This type of injury sounds similar in the nature of the right that was taken from the one plaintiff who had standing in *Dodak*, 441 Mich at 559-560, i.e., the member of the House Appropriations Committee who lost his right to approve or disapprove transfers following the Governor's actions.

In this respect the instant matter is distinguishable from *League of Women's Voters*, __ Mich App at __, slip op at 9, where the Court of Appeals remarked that "the validity of any particular legislative member's vote is not at issue[.]" Plaintiffs have at least a credible argument that they are not merely seeking to have this Court resolve a lost political battle, nor are plaintiffs only generally alleging that the law is not being followed. Cf. *id.* at 8. Rather, they are alleging that the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole. This is an injury that is unique to the Legislature and it shows a

substantial interest that was (allegedly) detrimentally affected in a manner different than the citizenry at large. Cf. *id*. at 7 (discussing standing, generally).

As a final argument on standing, the Governor contends that the Legislature does not need declaratory relief to guide its future actions. She and at least one amicus brief note that the Legislature has in fact moved toward amending the EPGA. At oral argument the Legislature was almost invited to amend either the EMA or EPGA. However, while the legislative body is well aware of its power to enact, amend, and repeal statutes, this Court believes that guidance as to the issues presented in this case will avoid a multiplicity of litigation. The parties here have pled facts of an adverse interest which necessitate the sharpening of the issues raised.

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

The Executive Orders at issue cite three sources of authority: the EMA, the EPGA, and Const 1963, art 5, § 1. The Court will examine each to determine whether the Governor possessed authority to issue the challenged orders.

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

The challenged orders in this case all contain a brief citation to art 5, § 1. This section of the Michigan Constitution vests "executive power" in the Governor. See Const 1963, art 5, § 1. The Governor invokes this power in claiming authority to issue the challenged Executive Orders. The Legislature has argued that Governor errs in relying on her art 5, § 1 "executive power" to issue orders in response to the pandemic. This court agrees that "Executive power" is merely the "authority exercised by that department of government which is charged with the administration or execution of the laws." *People v Salsbury*, 134 Mich 537, 545; 96 NW 936 (1903). In fact, the

Governor has not claimed in her briefing or at oral argument that she had the authority to enact EO 2020-67 or EO 2020-68 absent an enabling statute. Through two distinct acts, stated in plain and certain terms, the Legislature has granted the Governor broad but focused authority to respond to emergencies that affect the State and its people. The Governor's challenged actions—declaring states of disaster and emergency during a worldwide public health crisis—are required by the very statutes the Legislature drafted. Thus, the focus of this opinion, is on those two distinct acts, the EMA and EPGA.

THE EPGA AUTHORIZED EO 2020-67 AND SUBSEQUENT ORDERS RELIANT THEREON

The Court will first turn its attention to the EPGA and to plaintiffs' arguments that the EPGA did not permit the Governor to issue a statewide emergency declaration in EO 2020-67 or any subsequent orders reliant on EO 2020-67. Plaintiffs advance two arguments in support of their position: (1) first, they contend that the EPGA, unlike the EMA, does not grant authority for a *statewide* declaration of emergency, but instead only confers upon the Governor the authority to issue a local or regional state of emergency; (2) second, plaintiffs argue that if the EPGA does grant authority for a statewide state of emergency, the delegation of legislative authority accomplished by the act is unconstitutional. The Court rejects both of plaintiffs' contentions regarding the EPGA and concludes that EO 2020-67, and any orders relying thereon, remain valid.

Turning first to the scope of the EPGA, the Court notes that the statute bestows broad authority on the Governor to declare a state of emergency and to take necessary action in connection with that declaration. See MCL 10.31(1). Under the EPGA, the Governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.*

The Legislature stated that its intent in enacting MCL 10.32 was to "to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." Section 2 of the EPGA continues, declaring that the provisions of the EPGA "shall be broadly construed to effectuate this purpose." *Id.*

Reading the EPGA as a whole, as this Court must do, see *McCahan v Brennan*, 492 Mich 730, 738-739; 822 NW2d 747 (2012), the Court rejects plaintiffs' attempt to limit the scope of the EPGA to local or regional emergencies only. Informing this decision is the statement of legislative intent in MCL 10.32, which declares that the EPGA was intended to confer "sufficiently broad power" on the Governor in order to enable her to respond to public disaster or crisis. It would be inconsistent with this intent to find that "sufficiently broad power" to respond to matters of great public crisis is constrained by contrived geographic limitations, as plaintiffs suggest. The Court also notes that this "sufficiently broad" power granted by the Legislature references "the police power of the state[.]" MCL 10.32. In general, the police power of the state refers to the state's inherent power to "enact regulations to promote the public health, safety, and welfare" of the citizenry at large. See *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985). It cannot be overlooked that the police power of the state, which undeniably pertains to the state as a whole, see, e.g., *Western Mich Univ Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997), was given to a state official, the Governor, who possesses the executive power of the entire state. See Const 1963, art 5, § 1. Plaintiffs' attempts to read localized restrictions on broad, statewide authority given to this state's highest executive official are unconvincing.

The Act has a much broader application than plaintiffs suggest. The Act repeatedly uses terms such as "great public crisis," "public emergency," "public crisis," "public disaster," and

"public safety" when referring to the types of events that can give rise to an emergency declaration. See MCL 10.31(1); MCL 10.32. These are not terms that suggest local or regional-only authority. See *Black's Law Dictionary* (11th ed) (defining public safety). See also *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/public> (accessed May 11, 2020) (defining "public" to mean "of, relating to, or affecting *all the people of the whole area of a nation or state*") (emphasis added). Taking these broad terms and imposing limits on them as plaintiffs suggest would run contrary to MCL 10.32's directive to broadly construe the authority granted to the Governor under the EPGA. See *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (explaining that it is "well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."). And in this context, it is apparent the EPGA employs broad terminology that empowers the Governor to act for the best interests of all the citizens of this state, not just the citizens of a particular county or region. It would take a particularly strained reading of the plain text of the EPGA to conclude that a grant of authority to deal with a public crisis that affects all the people of this state would somehow be constrained to a certain locality. Moreover, adopting plaintiffs' view would require the insertion into the EPGA of artificial barriers on the Governor's authority to act which are not apparent from the text's plain language. To that end, even plaintiffs would surely not quibble that the broad authority bestowed on the Governor under the act would permit her to respond to an emergency situation that affected one county, or perhaps even multiple counties. Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA because, according to plaintiffs, rendering emergency assistance to the state's entire citizenry is not an option under the EPGA. While plaintiffs generally contend there

are localized or regionalized limitations on the Governor's authority under the EPGA, they do not explain how to demarcate the precise geographic limitations on the Governor's authority under the EPGA—and this is for good reason: there are no such limitations.

In arguing for a contrary interpretation of the scope of the Governor's authority under the EPGA, plaintiffs selectively rely on parts of the statute and ignore the contextual whole. For instance, they focus on the notion that a city or county official may apply for an emergency declaration in order to support their assertion that the EPGA only applies to local or regional emergency declarations. In doing so, plaintiffs ignore that the same sentence permitting local officials to apply for an emergency declaration also authorizes two state officials—one of whom is the Governor herself—to apply for or make an emergency declaration. See MCL 10.31(1). Equally unpersuasive is plaintiffs' fixation on the word "within" as it appears in MCL 10.31(1). Plaintiffs note that MCL 10.31(1) permits the Governor to declare a state of emergency in response to "great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state*" (emphasis added). According to plaintiffs, the use of the word "within" means that an emergency can only be declared at a particular location *within* the state, and precludes the state of emergency from being declared for the entire state. However, a common understanding of the word "within," including the same definition plaintiffs cite, demonstrates the flaw in plaintiffs' position. The word "within" is generally used "as a function word to indicate enclosure or containment." *Merriam-Webster's Online Dictionary*, <https://www.merriam-webster.com/dictionary/within> (accessed May 20, 2020). For instance, it can refer to "the scope or sphere of" something, such as referring to that which is "within the jurisdiction of the state." *Id*. In other words, the term "within" refers to the jurisdictional bounds of the state. The authority to declare an emergency "within" the state is, quite simply, the authority to declare an emergency across the entire state.

Plaintiffs next argue that, when the EPGA is read together with the EMA, it is apparent that the EPGA is not meant to address matters of statewide concern. In general, both the EPGA and the EMA grant the Governor power to act during times of emergency. "Statutory provisions that relate to the same subject are *in pari materia* and should be construed harmoniously to avoid conflict." *Kazor v Dep't of Licensing & Regulatory Affairs*, 327 Mich App 420, 427; 934 NW2d 54 (2019). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control." *In re AGD*, 327 Mich App 332, 344; 933 NW2d 751 (2019) (citation and quotation marks omitted).

Here, when the EMA and the EPGA are read together, it is apparent that there is no conflict between the two acts even though they address similar subjects. While plaintiffs are correct in their assertion that the EMA contains more sophisticated management tools, that does not mean that the EPGA is limited to local and regional emergencies only. Nor does the fact that both statues apply to statewide emergencies mean that one act renders the other nugatory. Instead, the Court can harmonize the two statutes, see *In re AGD*, 327 Mich App at 344, by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal. The use of these enhanced features comes at some cost, however, because the EMA is subject to the 28-day time limit contained in MCL 30.405(3)-(4), whereas an emergency declaration under the less sophisticated EPGA has no end date. Finally, plaintiffs' contentions regarding a conflict between the EMA and the EPGA are belied by MCL 30.417. That section of the EMA expressly states that nothing in the EMA was intended to "Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of

the Michigan Compiled Laws . . . ." MCL 30.417(d). In other words, the EMA explicitly recognizes the EPGA and it recognizes that the Governor possesses similar, but different, authority under the EPGA than she does under the EMA.

Plaintiffs' final attempt to assert that the EPGA was intended as a local or regional act is to point to what they describe as the history of the EPGA. In general, the legislative history of an act and the historical context of a statute can be considered by a court in ascertaining legislative intent; however, these sources are generally considered to have little persuasive value. See, e.g., *In re AGD*, 327 Mich App 342 (generally rejecting legislative history as "a feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction") (citation and quotation marks omitted). Here, the history cited by plaintiffs is particularly unpersuasive because, having reviewed the same, the Court concludes that it does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA. Nor have plaintiffs directed the Court's attention to a particular piece of history that expressly supports their claim; they instead rely on mere generalities and anecdotal commentary. Finally, the EPGA presents no ambiguity requiring explanation through extrinsic historical commentary.

In an alternative argument, plaintiffs argue that, assuming the Governor's ability to act under the EPGA gives her statewide authority, the executive orders issued pursuant to the EPGA are nevertheless invalid. According to plaintiffs, the Governor's exercise of lawmaking authority under the orders runs afoul of separation of powers principles.

Plaintiffs' constitutional challenge to the EPGA fares no better than their attempt to limit the Act's scope. This Court must, when weighing this constitutional challenge to the EPGA, remain mindful that a statute must be presumed constitutional, "unless its constitutionality is

readily apparent." *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 59; 669 NW2d 845 (2003) (citation and quotation marks omitted). Indeed, "[t]he power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict." *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997).

Const 1963, art 3, § 2 declares that "[t]he powers of government are divided into three branches: legislative, executive and judicial." The Constitution dictates that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id*. The issue in this case concerns what plaintiffs have alleged is an unconstitutional delegation of legislative power to the Governor. While the Legislature cannot delegate its legislative power to the executive branch of government, the prohibition against delegation does not prevent the Legislature "from obtaining the assistance of the coordinate branches." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003) (citation and quotation marks omitted). As explained by our Supreme Court, "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).

In general, the Supreme Court has recognized three "guiding principles" to be applied in non-delegation cases:

> First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. Second, the standard should be as reasonably precise as the subject matter requires or permits. The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation. The various and varying detail associated with managing the natural resources has led to

> recognition by the courts that it is impractical for the Legislature to provide specific regulations and that this function must be performed by the designated administrative officials. Third, if possible the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority. [*State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976) (internal citations and quotation marks omitted).]

Any discussion of plaintiffs' non-delegation issue must acknowledge that the policy goals and the complexity of issues presented under the EPGA do not concern ordinary, everyday issues. Rather, as the title of the act and its various provisions reflect, the EPGA is only invoked in times of emergency and of "great public crisis," and when "public safety is imperiled[.]" MCL 10.31(1). Hence, while the Governor's powers are not expanded by crisis, the standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation. *Blue Cross & Blue Shield*, 422 Mich at 51; *State Conservation Dep't*, 396 Mich at 309.

With that backdrop, and when viewing the EPGA in its entirety, the Court concludes that the Act contains sufficient standards and that it is not an unconstitutional delegation of legislative authority. At the outset, MCL 10.31(1) provides parameters for when an emergency declaration can be made in the first instance. The power to declare an emergency only arises during "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . ." *Id*. In addition, the statute provides a process for other officials, aside from the Governor, to request or aid in assessing whether an emergency should be declared. See *id*. (allowing input from "the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police"). Therefore, the EPGA places parameters and limitations on the Governor's power to declare a state of emergency in the first instance, which weighs against plaintiffs'

position. Cf. *Blue Cross & Blue Shield*, 422 Mich at 52-53 (finding an unconstitutional delegation of legislative authority where there were no guidelines provided to direct the pertinent official's response and where the power of the official was "completely open-ended.").

Furthermore, the EPGA provides standards on what a Governor can, and cannot, do after making an emergency declaration. As for what she can do, the Governor may "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary to protect life and property or to bring the emergency situation within the affected area under control*." MCL 10.31(1) (emphasis added). The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. See, e.g., MCL 500.3107(1)(a) (describing, in the context of personal injury protection insurance, "allowable expenses" that consist of "reasonable" charges incurred for "reasonably necessary products, services and accommodations . . . ."). Thus, the Court rejects any contention that these terms are too ambiguous to provide meaningful standards. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances). See also *Blank v Dept' of Corrections*, 462 Mich 103, 126; 611 NW2d 530 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority, in part, based on the enabling legislation constrained rulemaking authority to only those matters that were "necessary for the proper administration of this act."). Finally, in addition to the above standards, the EPGA goes on to expressly list examples of that which a Governor can and cannot do under the EPGA. See MCL

10.31(1) (providing a non-exhaustive, affirmative list of subjects on which an order may be issued); MCL 10.31(3) (containing an express prohibition on orders affecting lawfully possessed firearms). Accordingly, the EPGA contains some restrictions on the Governor's authority and it provides standards for the exercise of authority under the Act.[3]

In sum, the Court concludes that plaintiffs' challenges to the Governor's authority to declare a state of emergency under the EPGA and to issue Executive Orders in response to a statewide emergency situation under the EPGA are meritless. Thus, and for the avoidance of doubt, while the Court concludes that the Governor's actions under the EMA were unwarranted—see discussion below—the Court concludes that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA.

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

Turning next to the Governor's orders issued pursuant to the EMA, the Court again notes that the legitimacy of the initial declaration of emergency and disaster, Executive Order No. 2020-04, is unchallenged in this case. The extension of that declaration under EO 2020-33 is likewise agreed to be a legitimate exercise of gubernatorial power. This court is not asked to review the scope of myriad emergency measures authorized under either declaration. The laser focus of this case is the legitimacy of EO 2020-68, which re-declared a state of emergency and state of disaster under the EMA only one minute after EO 2020-66 cancelled the same. The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees.

[3] The Court notes that Judge Kelly reached a similar conclusion, albeit in the context of denying a motion for preliminary injunction, in the case of *Mich United for Liberty v Whitmer*, Docket No. 20-000061-MZ.

The EMA allows circumvention of the traditional legislative process only under extraordinary circumstances and for a finite period of time. Enacted in 1976, the EMA grants the Governor sweeping powers to cope with "dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). These powers include the authority to issue executive orders and directives that have the force and effect of law. MCL 30.403(2). The Governor may also, by executive order, "Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency." MCL 30.405(1)(a). Additionally, the Governor may issue orders regarding the utilization of resources; may transfer functions of state government; may seize private property—with the payment of "appropriate compensation"—evacuate certain areas; control ingress and egress; and take "all other actions which are which are necessary and appropriate under the circumstances." See, e.g., MCL 30.405(1)(b)-(j). This power is indeed awesome.

The question presented is whether the Governor could legally, by way of Executive Order 2020-68, declare the exact states of emergency and disaster that she had, only one minute before, terminated. The Legislature answer with an emphatic, "No," and the Governor offers an equally emphatic, "Yes."

As with most contracts, the Legislature asserts that time is of the essence in the limits of the extraordinary power afforded the executive under the EMA. The Act is replete with references to timing. MCL 30.403 provides as follows:

> The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation*

> *declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature*. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. [MCL 30.403(3) (emphasis added).]

Later the act addresses the duration of a "state of emergency," and its extension under MCL 30.403(4):

> The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.* An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. [Emphasis added.]

The limitation of 28 days is repeated multiple times. A state of emergency or disaster, once declared, terminates no later than 28 days after being initially declared. The Governor can determine that the emergent conditions have been resolved earlier than 28 days. Alternatively, the Governor may ask the Legislature to extend the emergency powers for a period of up to 28 days from the issuance of the extension. Nothing in Act precludes legislative extension for multiple additional 28-day periods. In this case the Governor stated in EO 2020-66 that she expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired. In fact, EO 2020-66, the order that terminated the states of disaster and emergency under the EMA, expressly acknowledged that the emergency and/or disaster had not subsided and still remained In this respect, EO 2020-66 complied with MCL 30.403(3) and (4)'s directives that the Governor "shall,"

after 28 days, "issue an executive order or proclamation declaring" that the state of emergency and/or disaster terminated.

However, the Governor argues that she may continue to exercise emergency powers under the EMA without legislative authorization in this case. She argues that she has a duty and the authority to do so because the Legislature failed to grant her the requested extension despite the fact that the emergent conditions continued to exist.

Neither party to this case denies that the COVID-19 emergency was abated as of April 30. No serious argument has been offered that had the Governor not issued EO 2020-68 that all of the emergency measures authorized by EO-33 would have terminated with the signing of EO 2020-66 on April 30 even if had the governor not vetoed SB 858, which purported to embody several of the expiring Executive Orders and which would not have been effective until 90 days later because the Legislature did not give that bill immediate effect. The Governor asserts she had a duty to act to address the void. She argues that MCL 30.403(3) and (4) compelled her, upon the termination of the states of emergency and disaster accomplished by way of time, to declare anew both states of emergency and disaster within minutes. The Governor makes this argument by emphasizing language in MCL 30.403(3) and (4) stating that, if the Governor finds that a disaster or emergency occurs, then she "shall" issue orders declaring states of emergency or disaster. Thus, argues the Governor, when the 28-day emergency and disaster declarations ended, but the disaster and emergency conditions remained, the Governor was compelled, irrespective of legislative approval, to re-declare states of emergency and disaster.

The EMA does not prohibit a governor from declaring multiple emergencies or disasters during a term of office or even more than on disaster at the same time. Indeed, the collapse of the

dam at the Tittabawassee River sparked the issuance of a separate state of emergency and disaster during of this lawsuit. Clearly the collapse of the dam and the subsequent flooding was a new and different circumstance from the COVID-19 pandemic. Returning to the instant case, it could also be argued that the very fact that the Legislature had neither authorized the extension of the emergency powers of the Governor under the EMA nor put in place measures to address the emergent situation was itself a new emergency justifying gubernatorial action. However, the "new" circumstance was occasioned not by a mutation of the disease into something such as "COVID-20," a precipitous spike in infection, or any other factor, except the Legislature's failure to grant an extension.

Thus, while the Governor emphasizes the directive that she "shall" declares states of emergency and disaster, the Court concludes that the Governor takes these directives out of context and renders meaningless the legislative extension set forth in MCL 30.403(3) and (4). The Governor's position ignores the other crucial "shall" in the statute. "After 28 days, the governor *shall* issue an executive order or proclamation declaring the state of" disaster or emergency terminated, "*unless a request by the governor for an extension of the state of*" *disaster or emergency* "*for a specific number of days is approved by resolution of both houses of the legislature*." See MCL 30.403(3) (as to disasters); MCL 30.403(4) (as to emergencies). The language employed here is mandatory: The Governor "*shall*" terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it. See *Smitter v Thornapple Twp.*, 494 Mich 121, 136; 833 NW2d 785 (2013) (explaining that the term "shall" denotes a mandatory directive). Stated otherwise, at the end of 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the "shall terminate"

language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. Nor does the statute permit the Governor to simply extend the same state of disaster and/or emergency that was otherwise due to expire. To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. Whatever the merits of that might be as a matter of policy, that position conflicts with the plain statutory language. The Governor's attempt to read MCL 30.403(2) as providing an additional, independent source of authority to issue sweeping orders would essentially render meaningless MCL 30.405(1)'s directive that such orders only issue upon an emergency declaration. It would also read into MCL 30.403(2) broad authority not expressed in the subsection's plain language. See *Robinson*, 486 Mich at 21 (explaining that, when it interprets a statute, a reviewing court must "avoid a construction that would render part of the statute surplusage or nugatory") (citation and quotation marks omitted). See also *United States Fidelity & Guarantee Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) ("As far as possible, effect should be given to every phrase, clause, and word in the statute."). The Court is not free to "pick and choose what parts of a statute to enforce," see *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 143; 892 NW2d 33 (2016), yet that is precisely what the Governor's position has asked the Court to do. The language of MCL 30.403(3) and (4) requiring legislative approval of an emergency or disaster declaration should not so easily be cast aside.

Finally, and contrary to the Governor's argument, the 28-day limit in the EMA does not amount to an impermissible legislative veto. See *Blank v Dept' of Corrections*, 462 Mich 103, 113-114; 611 NW2d 530 (2000) (opinion by KELLY, J.) (declaring that, once the Legislature delegates authority, it does not have the right to retain veto authority over the actions of the

executive). The Governor's characterization of the 28-day limit as a legislative veto is not accurate. The 28-day limit is not legislative oversight or a "veto" of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated. That is, the Governor is afforded with broad authority under the EMA to make rules and to issue orders; however, that authority is subject to a time limit imposed by the Legislature. The Legislature has not "vetoed" or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter.

CONCLUSION

IT IS HEREBY ORDERED that the relief requested in plaintiffs' motion for immediate declaratory judgment is DENIED. While the Governor's action of re-declaring the same emergency violated the provisions of the EMA, plaintiffs' challenges to the EPGA and the Governor's authority to issue Executive Orders thereunder are meritless.

This order resolves the last pending claim and closes the case.

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

Plaintiffs,

Case No. 20-000079-MZ

v Hon. Cynthia Diane Stephens

GOV. GRETCHEN WHITMER,

Defendant.

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PAGE 1 TO 60

The Hearing before the Honorable
Judge Cynthia D. Stephens,
Taken via Hanson Remote,
Commencing at 10:00 a.m.,
Friday, May 15, 2020,
Before Shacara V. Mapp, CSR-9305.

Court reporter, attorneys & witness appearing remotely.

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Remote Hearing

Friday, May 15, 2020

About 10:00 a.m.

* * *

JUDGE STEPHENS: This is the case of the Michigan House of Representatives and Michigan Senate versus Gretchen Whitmer. It's Case No. 20-000079. It is in the State of Michigan, Court of Claims.

Representing the Plaintiffs are Patrick G. Seyferth, Susan M. McKeever, Hassan Beydoun, William R. Stone. And appearing today, Michael R. Williams, who is also joined by Frankie A. Dame.

Representing the governor and the State of Michigan are Christopher Allen, Joseph T. Froehlich, Joshua Booth, John Fedynsky, all from the Michigan Department of Attorney Generals.

Could we please bring in the parties?

Good morning, Counsel. If you would, unmute and state your appearances for the record.

MR. WILLIAMS: Well, good morning, Your Honor, Michael Williams appearing for the Michigan House of Representatives and the Michigan Senate.

MR. ALLEN: Good morning, Your Honor, Assistant Solicitor General Chris Allen on behalf of the governor.

THE COURT: Okay. Gentlemen, we are gifted with technology, which has both its benefits and its dangers. We are going to presume that Ms. Mapp is going to be able to hear each and everything that is said. But if at any time she does not, she's going to let us know immediately, so that we can have it repeated or if it's something you're showing, demonstrated again.

By the same token, we are gifted with the assistance of the IT Department from the Court of Appeals. And they will let us know if anything happens out there in IT land. I'll get a text or some sort of a notification.

By the same token, gentlemen, if at any point in time, you can't hear what's going on, please let us know so that we can correct that as soon as possible. Can we agree?

MR. WILLIAMS: Absolutely, Your Honor.

MR. ALLEN: Yes, Your Honor.

THE COURT: Okay. I stated the names of all the other persons who have joined you, and I appreciate the fact that with the many fine lawyers that are involved, you dwindled it down to the lucky two as opposed to all of you.

Preliminarily, the Court would indicate for

the record, and to those who are watching this, that we did receive a single motion for intervention in this case. It was filed on behalf of John Brennan, Samuel Gunn, Eric Rosenberg, Mark Buchi and Martin Leith, all members of the State Bar of Michigan.

The Plaintiff, in response to this, said it took no position, but reminded us that time was of the essence and asserted that they, in fact, had more than an adequate representation of the issues in the case.

The Defendant, similarly, reminded us that time was of the essence and was opposed to the motion.

The Court made the determination that while motions for intervention should be liberally allowed, that in this particular case, there was a more than adequate representation of the key issues in the case; that the gentlemen in the proposed interveners were focused additionally on particular issues relative to the practice of law and the rights, duties, and responsibilities of litigants, and that those issues were probably best handled separately.

To that end, the Court declined; and the intervention also noting, that bringing them in was going to mean that we would be delaying this probably by another week in order to give everyone an adequate opportunity to respond.

The Court also received a series of motions to file amicus curiae. We received them from the Michigan House Democratic Leader, Christine Greig, and the House Democratic Caucus; from the Michigan Senate House Democratic Caucus from Professor Richard Primus, from 41 Healthcare Professionals, from the Michigan Nurses Associations, for the Michigan United for the Liberty, and from the Mackinac Center for Public Policy. There was an acquiescence on the part of the parties to 41 Healthcare Professionals. And the Court made the determination that it would accept all the other's amicus curiae briefs, that they would be received by the Court, and any other briefs that was received by 5:00 yesterday. There may have been some more, I don't know. I'll go back and look at them.

We made the determination that additionally, that while we appreciate their briefing and their insight and their intelligence, that we would restrict the issues of oral argument to the parties in this case.

As we begin the oral argument today, I'm going to ask that we slightly alter our traditional trajectory, which would be for the petitioner, the Plaintiff, to say everything you have to say, save a couple seconds for rebuttal, hear from the respondent

and then hear your rebuttal. What I'd like to do is to start out with two issues: The issues of standing and compliance with MCL 600.643(1), and then get to the meat of the arguments that you've presented.

With that in mind, on behalf of the plaintiffs, could you address both, and I guess in your case first, MCL 600.6431, the need for verification for cases filed in the Court of Claims and the standing of your clients?

MR. WILLIAMS: Thank you, Your Honor. I'll start with the verification requirement. I think this issue is fairly straight forward.

The statute contemplates that the pleadings of the State need not be verified. And as Your Honor noted actually, in an argument I believe was held last week, on issues that were similar, somewhat related, the Attorney General's, Office, themselves, succeeded that an arm of the state like the legislative branch, or in that case, the executive branch, is essentially the same. Like I believe they characterized it as exactly the same.

So in that sense, the requirement for a verified pleading, we would contend would not apply to the Michigan House of Representatives and the Michigan Senate because they constitute the pleadings of the

State. But even if they did need a verifying pleading or at least a notarized pleading, we would contend that there's no reason for this Court to take an action such as dismissal in this case for a few reasons.

One, is that under the Arnold decision, the provision requiring the verification and notarization of pleadings is not a jurisdictional provision. The Court of Claims determined in that case, that it was actually error to dismiss an action based on the sole lack of a notarization on the presence of a pleading in that case.

There obviously are authorities that in some circumstances, the lack of a notarization was deemed sufficient to justify dismissal. But in those cases, there were statute of limitations in other time bars that were implicated, such that the lack of a notarization or the lack of a verification coming after the time bar, basically prevented a fully complete, fully compliant pleading from being filed within the time restrictions that are imposed by the Court of Claims Act in other statutes.

In this case, of course, the legislature has filed an additional verification that, itself, contains a notary stamp. That was filed just a couple days ago. So in that sense, there's no issue whatsoever with the

time bar or the statute of limitations or any of the concerns that animated or led the Court in other cases, to find that there was a reason to dismiss based on a lack of a notarized verification.

Based on that cure, based on the legislature statuses, a part of the State and based on Arnold's position, that this is a non-jurisdictional issue, as well as I think the State's position that they have not actually come out and contended for dismissal based on the lack of a notarization.

I think this Court can move forward with the lawsuit and not require, for instance, the resubmission of an identical complaint with a notarization followed by resubmissions of identical motions and argument.

But as to the standing issue, I think, Your Honor, we addressed some of this in our reply and I don't want to tread down the same road all over again, but there are a few essential points that I think are important to consider here.

The Arizona legislature case, I think, is a great example of how the Michigan legislature has a special position as a litigant in a case like this one. Obviously, that was a federal decision. Obviously, Article 3, standards are different. Frankly, they're stricter. And we have to be careful when applying

federal decisions, although the Michigan Supreme Court has done so.

All that said, what Arizona legislature does is, is acknowledge the commonsense idea, that the legislature being the lawmaking body of the state has an interest in protecting itself from infringements upon that lawmaking power.

What the authorities of the state say is that the powers of the relative branches are essentially -- mutually exclusive; that when one exercises a power that properly is held by another, that seizes the power from the other branch. So in that sense, there's a very direct injury.

I think this is even acknowledged, Your Honor, in the DoDAAC decision that the governor principally relies upon in pressing the standard argument. In that case, the Court actually did find standing on -- as to one individual legislature because that individual legislature's votes had effectively been nullified.

And in this cause, of course, there's a similar idea. The acts of the legislature have effectively been defeated by the acts of the governor extending, for instance, the declaration beyond the 28-day provision.

I think that we have to be careful with DoDAAC because standing cases in both Michigan courts and the federal courts recognize a serious distinction between individual standing and institutional standing. And the legislature here is acting in its institutional capacity. And in that sense, that changes the calculus from the provisions that the governor is citing from DoDAAC, for instance.

So given all those considerations and given the clear affront to the separation of powers and the clear infringement on the legislature's lawmaking power, we would contend that the legislature is properly empowered and has standing to move forward with this case.

JUDGE STEPHENS: Mr. Allen.

MR. ALLEN: Your Honor, first to address MCL 600.643 (1). I would agree with opposing counsel insofar as, we have not asked for dismissal of this case. There's no time bar that's effective at this point. We were -- we noted the deficiency in our responsive pleading. Essentially, you get the plaintiffs to cure the defect.

And so, we're not asking this Court to dismiss the matter if need not, but we essentially wanted the legislative plaintiffs to follow the Court

of Claims Act to ensure that their complaint was properly filed and verified.

Moving on to the standing issue, I think to set the background here, a large part of the claim or one of the claims before this court is a constitutional challenge to a law that the legislature passed.

And I think that while DoDAAC is informative, the League of Women Voters case is even more so here, and just released. You're quite familiar with it, Your Honor.

But in that case, the House and Senate lacked standing. But they presented, at least, a colorful claim of it. There the House and Senate purported to protect the constitutionality of certain ballot restrictions that they imposed. But even there, the Court found that there was an insufficient actual controversy. But essentially once -- once the legislature does its job, passes a bill that's active into law, they have no legal interest in what happens after that point.

And here, I think, to distinguish -- not to distinguish League of Women Voters, but to sort of drive its point home, in that case, they sought to at least protect the constitutionality of their -- their loss. Here, they're seeking to do the opposite. So

their interest here in that is it's unclear.

There's another way to get to the result that they seek, which is to amend the law. Which they remained fully empowered to do, despite their protestations that essentially, the governor had stolen power from the legislature. They remained perfectly able to pass laws, hold hearings, introduce bills, do all the things that a legislature does. And so therefore, the legislature lacks an institutional injury. There's no disruption to that body's specific power to legislate.

And I think a related point regarding the -- the relief sought in the declaratory judgment, whatever Your Honor -- whatever order Your Honor ultimately enters is not going to affect the Plaintiff's legal rights. It may affect the political considerations or how votes are counted, but as far as the institutions go, those are the plaintiffs before us, before Your Honor, the institutions are fully able to do everything today, as they would be tomorrow, no matter what your declaratory judgment -- whatever your decision on the declaratory judgment relief is.

And so, for those reasons, the plaintiffs seek only to default the governor from doing something. Their full ability to continue to act remains.

JUDGE STEPHENS: Okay. Do you have anything further on about behalf of the plaintiffs in this regard?

MR. WILLIAMS: Briefly, Your Honor, because Counsel did touch upon the League of Women Voters' case and the decision of the Court of Appeals that's currently pending before the Michigan Supreme Court.

I think this is pretty easily distinguishable from the League of Women Voters' case, Your Honor. For one, that was merely the legislature saying we want to seek enforcement of this law. That's quite distinct from the argument that the legislature's presenting here, Your Honor, where we're contending that the Executive has actually seized the exercise of power that would ordinarily be reserved to the legislature itself.

This is not just about whether we agree with the manner in which a law has been executed. This is about her depriving us of the legislative tools that we would otherwise possess, to help manage this pandemic. And in that way, this is exactly the situation that the League of Women Voters cut case contemplated, when it said the legislature there was not asserting that it was deprived of personally and legally cognizable authority that is peculiar to those chambers alone.

The lawmaking power is, of course, peculiar to the chambers of the legislature as defined in the Michigan Constitution.

So for that reason, Your Honor, we would say that League of Women Voters is simply not helpful to the governor's position.

JUDGE STEPHENS: Okay. As we start to look at the major issue for the purposes of framing this, there is no factual dispute in this case. Everyone agrees that the orders at issue were issued under 202067 and 202068, under both the EPGA and under the EMA, that they were based upon an assertion of an emergency condition relative to COVID-19.

There is also not a controversy for the purposes of our conversation today, as to whether or not, and what the extent to which COVID-19 occasions a danger or a harm to the people of the State of Michigan.

The issue here is purely whether the government -- governor's actions were ultra vires, either under the Constitution of the State of Michigan, under the Emergency Manager Act or under the Emergency Powers of Government Act. And then secondarily, whether or not the EMPGA is itself, unconstitutional.

So understanding that, many of the parties

who filed the amicus briefs focused on the nature of COVID-19, its impact on the people of the State of Michigan, and many other policy determinations. Those are important, certainly. But this is an as-written challenge.

You're saying on behalf of the plaintiffs, that the orders on their face are facial and valid because of a lack of authority. And we're not really concerned, at this point, although we may at some other point, have to be concerned about whether or not they are the individual orders, and there are many of them, are appropriate, are either reasonable or reasonably tailored and narrowed.

So with that, Mr. Williams, if you would begin your argument as to the main claim and your request that we declare the emergency order 2020-67, 2020-68, and all other emergency executive orders that arise from those two, to be invalid.

MR. WILLIAMS: Thank you, Your Honor.

And Your Honor is exactly right. That's one of the most important things to understand and engage in with these issues is that this is not an argument about the existence or non-existence of a crisis.

This case is instead about a question of whether a governor, this governor or any governor in

the future can exercise effectively, a limitless-unilateral-temporally-unbounded authority, exercising the lawmaking power of this state for as long as the governor wishes.

In the 1963 Michigan Constitution, the Constitution gave the power and the duty to pass suitable laws for the protection and promotion of the public health to the legislature. The legislature was charged with the responsibility of ensuring that Michiganders are safe and healthy.

In discharging that duty, the legislature has, in fact, given some degree of authority to the governor, to assist in that task. But in doing so, the govern -- the legislature also ensured the governor was in some ways limited; in some ways, constrained. Because again, the governor is ultimately in the executive office whose ultimate job is to execute the laws and not make them.

So there are two principle laws, of course, that we're dealing with here: The EMA, the 1976 provision; and the 1945 EPGA, the Emergency Powers of the Governor's Act. Both of those authorizations contained particularized limits on the execution of the powers given within them.

The governor here, however, has tried to take

the powers that are granted by those acts and leave the limits on the table. And as we explained in our briefing, Your Honor, that's simply unacceptable. Not only that, Your Honor, she has construed the EPGA, in particular, so broadly, as to create serious problems under the separations of powers doctrine in the Michigan Constitution.

Like the president's actions in Youngtown -- Youngstown Sheet and Tube, the governor has acted against the expressed will of the legislature. And in that way, is exercising authority that does not exist. It exists at its so lowest ebb. And for that reason, Your Honor, it would not be constitutional if the governor's EPA construction were, in fact, the proper one.

So I want to start, Your Honor, with the provision that actually applies clearly to statewide circumstances and emergencies. And that's the EMA, 1976 Emergency Management Act. This is the statue that actually contemplates statewide conditions and specifically refers to an epidemic.

The provision, as you know, contemplates that declared states of emergency and disaster will last no longer than 28 days, absent an extension from the legislature. At that point in time, the governor must

terminate the declaration of declaring state of emergency or disaster.

On April 30th, Governor Whitmer did, in fact, terminate her declared states of emergency and disaster because after one extension, the legislature declined to grant an additional extension of her emergency powers under the EMA. But then, just one minute later, Governor Whitmer re-declared her states of emergency and states of disaster. And incredibly, she now contends that that's fully compliant with the text of the EMA.

Your Honor, I'm sure you noticed this. In the 60-some pages of briefing that the governor submitted in justification of her actions in this case, I was unable to find any rational explanation for why the 28-day provision would exist if the governor's construction were appropriate and proper.

If the governor could go to the legislature and say I need an extension, have the legislature decline such an extension, and then nevertheless reinstate the declaration all over again, then the 28-day provision in the Emergency Management Act would be meaningless. They treat this, Your Honor, instead as something like a renewal provision, a time for public testimony where the governor comes forward and

says the reasons why she's going to re-enter a declaration of emergency or disaster.

That is not at all consistent with the plain text of the statute. And frankly, it would be needless because the statute itself, already requires the governor to terminate the declarations of emergency disaster immediately upon the determination that those conditions have ended. So she's already required to continually justify why she's leaving these declarations in place. The 28-day cutoff just wouldn't be necessary.

And the other part about this is, the legislature wouldn't have any role in that process. There would be no need for a request to the legislature to extend, followed by a declination, followed by the governor's moving ahead with the exact thing the legislature had declined to offer her. The governor --

JUDGE STEPHENS: Mr. Williams, I have a question, if I may.

MR. WILLIAMS: Certainly.

JUDGE STEPHENS: I understand that the one minute is certainly not enough. But let's assume for the sake of our conversation, that on April the 30th, all of the executive orders evaporated and either the legislation that was sent to the governor's desk was

accepted or vetoed and overridden or not; and we get to the fall and in the fall, the conditions materially exacerbate. There is either a different mutation of COVID-19 or a rapid resurgence. Is that a new emergency triggering a new 28 days?

MR. WILLIAMS: Well, I think we have to look to the text of the statute itself, Your Honor, to make that determination. It's not as simple as a time cutoff, unfortunately. But the statute gives us the answer.

The statute says that you have to look to the nature of the disaster, the area or areas threatened, the conditions causing the disaster and the conditions permitting the termination of the state of disaster. There's obviously parallel language in the state of emergency as well.

So I think what a Court would be charged with doing is saying, would the fall declaration, based on a second wave, present a new type of disaster, new areas threatened, new conditions causing the disaster and new -- new conditions permitting termination of that state.

And I think here, Your Honor, there's no contention whatsoever that the conditions as of one minute after the termination had materially changed in these four regards, between the termination and the

second declaration.

So I think that's why the legislature, Your Honor, finds such a substantial problem with the on-again, off-again light switch approach to a 28-day declaration.

Obviously, as Your Honor said, if there is a mutation, for instance, if there's a new condition, if there are material -- material and substantial differences that are identifiable and can be tested by a Court and measured as a standard, then I think in those circumstances, the 28-day limitation would, in fact, be respected.

JUDGE STEPHENS: Okay. Please continue.

MR. WILLIAMS: And I think, Your Honor, your question about the fall raises a good point, which is that under the governor's construction, this 28-day provision would essentially extend itself indefinitely. The governor has not been entirely consistent in what she considers to be the conditions that would justify termination of the disaster or the emergency declaration.

At times, for instance, she's suggested that the conditions would not end until such time as a vaccination would be created, for instance. That would mean we would be talking about 2021, 2022, perhaps

later. At other times, she's talked about the economic consequences of the disaster.

Just this morning, there were studies that talked about how the unemployment consequences of this -- this pandemic could last well into 2022, 2023, even 2024.

So based on her construction where, if she just continues to view there being an emergency or a disaster, then she can turn it on and off with a ministerial act of terminating and re-declaring. We would be talking the exercise of executive power with no legislative input for a period of years, based on the exact same conditions that existed at first precipitated the declaration back in March and April.

I think that's not at all what this Act was meant to do. And we know that, for instance, from looking at the legislative history for instance, where there's discussion in -- for instance, the -- when the legislature extended the 14-day window which is what it originally was, to 28 days. There's discussions about the need to get legislators back to Lansing to convene and pass legislation.

So what's clearly contemplated through this 28 days is essentially that the governor will act expeditiously. She gets to do the initial quick

reaction. But that once there's time for the legislature to reconvene and act, then it should, in fact, assume its constitutional role as the lawmaking authority in the State of Michigan.

And I think beyond that, Your Honor, the governor's new argument, never before advanced until the response that they filed in this case, that the governor possesses some generalized authority that in some indeterminate way justifies her actions here, really highlights the danger that -- that lies in the governor's broad construction of the EMA.

The EMA is structured in a way that has very particular safeguards, very particular standards that are meant to be met. But then the governor, in filing their brief in this case, suggests that there's an authorial sense of authority. That the governor can exercise, at essentially, her total discretion.

Your Honor, I've never heard that articulated by any other governor. Certainly has not been suggested in any of the legislative text. And even to this point, I have not heard that suggested by Governor Whitmer until the response in this case.

And again, that's important because it shows the need for some checks and balances. If a governor is really going to assert that degree of broad power,

that degree of just generalized all-encompassing power, there needs to be some mechanism by which the People's legislators can say, no, we're ready to take the reins, we are ready to be the ones to actually reassume the lawmaking power now that the expedience has passed.

I think, Your Honor, the governor, for instance, offered an analogy about the ringing of a fire alarm and that the fire men don't drop the hose when the fire alarm stops ringing. I think that's the wrong way to think about this provision. The right way to think about this provision is to imagine that your neighbor's house is on fire and you run outside with your garden hose because you're next door, you're a minute away, and you start spraying water at the house in an effort to help your neighbor. But when the fire men arrive on scene, when they have the hoses and the better equipment, they're the ones who should take control of the situation and fight the fire.

And I think that from looking at the text of the statute, from the structure of the status, from the legislative history of the statute, that's the way this is meant to work. And instead, we find ourselves with a governor who has determined that she wants to continue with the garden hose and leave the firemen aside, and insist upon continuing on her own course

even as the legislature has expressly said they would not wish her to do so.

Given all that, Your Honor, I think those are the most troubling aspects of the EMA argument. To be honest with you, Your Honor, I have trouble engaging with the governor's EMA argument because most of it does not actually engage with the 28-day provision. Most of it simply talks about the need for emergency powers and the need for emergency response. The legislature does not quibble with that.

The only thing the legislature thinks is that there needs to be reasonable limitations on the exercise of those emergency powers, less they become too broad, less the constitutional distinctions between the executive and legislative branches be lost. And one of those important provisions, Your Honor, is the 28-day provision.

Would Your Honor like me to go on to the EPGA, or do you want me to take each of these in turn?

JUDGE STEPHENS: Why don't we hear from your colleague about the EMA first.

MR. WILLIAMS: Thank you.

MR. ALLEN: Thank you, Your Honor.

As we talk about the EMA, I'd just like to emphasize that states across the country have granted

their legis -- the legislatures have granted the governors broad police powers to respond in crisis like this.

And as to the Acts, I think the interplay between them is important. The 1945 Act, the EPGA, provides for this broaden trusting of the state's police power during public emergencies. And the '76 law does as well, but it also provides a more detailed statutory rubric that activates and guides state and local efforts, in response to these emergencies and disasters.

And I think we glossed over a little bit, their challenge to the EPGA, her authority under that, separate and apart from the non-delegation issue that we'll get to in a bit.

The 1976 EMA makes clear that it is a supplement to the 1945 law. MCL 30.417(d) makes it clear that the new law shall not be construed to limit or modify, or abridge in the governor's authority under the 1945 Act or any other power of the governor, independent of the '76 Act.

In other words, we don't need to look to traditional hands of statutory construction, which are an aid in finding legislative intent. Legislative's intent is clear on its face. They intended the Act to

be distinct in overlapping or compounding sources of authority. Which makes sense because in emergency, in a circumstance in which, a nimble response is necessary, the -- the legislature presumably didn't want to have any holes in that authority.

And so, adding the EMA in addition to the EPGA makes perfect sense. There is no need to try to read those together so that there's no overlap whatsoever, because the legislature told us not to.

Now, moving specifically to the EMA, as Your Honor has directed, there are two distinct strains of authority: There's a general authority, and in Sections 1 of 2 of 30.403. And in 30.403, three and four discusses kind of what we've been talking about, these declarations. The governor's substantive actions like the stay-at-home order and all the substantive underlying executive orders are supported by both.

But as Your Honor noted, there is no dispute about the existence of an ongoing disaster or emergency.

And under the EMA, the governor shall declare such a disaster or emergency, which is issue an executive order, that's how the statute defines state of disaster, state of emergency. Those are defined terms of the statute. Those are species of executive

orders. It's not some femoral concept about state of disaster. It is a -- it is a document that's issued by the governor that actuates particular powers that are outlined throughout the EMA.

And so, when the governor terminated her earlier executive order, in EO 2266, she was following the plain language of the statute that the legislature enacted. There are three ways in which the executive order, the declaration, must be terminated: Conditions have passed, or if they've been dealt with, or after 28 days, if absent legislation ratification.

The first two obviously didn't happen. The plaintiffs concede that. And it had been in 28 days. So on the 28th day of the extension -- or excuse me, the legislative extension of the earlier declaration expired on April 30th. So at this time, the governor terminated that executive order as she was required to do. But despite that, her duty to declare an emergency, if the conditions require it, persists.

There's nothing in the text, at all, about the governor's inability to continue responding if the disaster exist. And that's, I think, part of the absurdity here, Your Honor. There's no dispute that a disaster and emergency exists. Yet, the legislature withheld. And they can do that under the statute. I'm

not saying they were statutorily obligated to do so, but they didn't. That does not remove the governor's duty to declare if the conditions warranted.

And so, the -- there's been some discussion about the re-issuance of the declaration. It's an entirely new executive order. And I think it's fair to say that, you know, most emergencies or disasters largely resolved after 28 days. If it's a, you know, uprising or a tornado or a flood. So the 28-day limitation serves an important purpose. It provides an automatic expiration should -- of that initial declaration.

And at this point --

JUDGE STEPHENS: So, Mr. Allen, your perspective then would be, so long as the governor perceives there to be an emergency, the governor is free every 28 days to terminate one emergency and declare an identical emergency to have begun the next day, and that that's entirely valid under the EMA?

MR. ALLEN: Correct, Your Honor.

Yes, I agree it is by the plain statutory language. And it's --

JUDGE STEPHENS: But it's plain statutory language, from your perspective, the governor could declare a state of emergency for an entire term of

office, and there would be nothing that the legislature could do about it if they disagree; is that correct?

MR. ALLEN: Your Honor, the con -- if the con -- not necessarily, Your Honor, because the conditions --

JUDGE STEPHENS: Then what could they do?

MR. ALLEN: Well, the -- I wanted to answer your question in two parts. I think it was two parts.

First of all, the governor can't just declare an emergency if she feels like it. The conditions have to exist. And that is undisputed here.

And so, if the -- unless the plaintiffs want to argue that shall doesn't mean shall, then she is obligated to issue a declaration and executive order under the same --

JUDGE STEPHENS: Okay. But that wasn't what I asked you.

Your perception is so long as she perceives validly or invalidly that there is an emergent condition, she can terminate one order and start another for as long as she deems appropriate. And the legislature would have no role, under the EMA, to do anything about it?

MR. ALLEN: No, Your Honor.

JUDGE STEPHENS: That's kind of a yes or no.

MR. ALLEN: No. Because, and I think the language --

JUDGE STEPHENS: No, they can't do anything about it; that's what you're saying?

MR. ALLEN: No. Your Honor, what I'm saying is validly or invalidly, I think is the crux of the matter. She can't just say that there's an emergency if there isn't. And her declaration is --

JUDGE STEPHENS: Why not? Who can do anything about it?

MR. ALLEN: The -- as we've acknowledged this in our brief, Your Honor, that a plaintiff could challenge the governor's declaration if it's not supported by the facts. Now, of course, there's substantial deference given to her judgment, but that's a judicially reviewable decision, Your Honor. That's not our case.

JUDGE STEPHENS: So your contention is the governor can act, and a pry -- it is up to an individual and private citizen then, to seek to terminate? There is no institutional role; is that correct?

MR. ALLEN: The institutional role, Your Honor, I think that that moves into a problem with the legislation with the EMA if the legislature's right

about their position. Because I think that implicates, and it sort of moves to a different argument. I don't mean to pivot you, Your Honor, but I think this is part and parcel of the same question.

If the legislature's right, that the governor has this authority, but that they can revoke it from her after 28 days, with a mere resolution, that creates its own constitutional problems under the legislative veto doctrine. And I think to -- it's not --

JUDGE STEPHENS: Okay. So whenever the -- that is probably the worst argument you have. Just real honest with you. That one is not going to go very far with me.

The legislature acting is not a veto. The legislature has the privilege and the obligation to act. The two entities don't agree with each other. I got that. But my concern is that if I understand you correctly, so long as a governor perceives there to be an emergent condition, albeit one that has lasted much longer than 28 days, that governor has the ability to declare a new state of emergency or a continuing state of emergency, and that the only -- there is no role for the legislature in seeking the termination of that authority, that that role is left to the private citizenry. That's what I understand you to say. Why,

doesn't matter. But it would have to be to the private citizenry. Because first, you said they had no standing to begin with.

So if they had no standing to begin with, certainly, it's not going to get more standing. But you believe this is a private citizen issue; is that correct?

MR. ALLEN: Your Honor, I don't believe it's a private citizen issue. I think the characterization that the governor can completely decide whether there's an emergency or not is -- that's not our position. The emergency and disaster are defined by the statute as contained in certain --

JUDGE STEPHENS: But if the people don't -- okay. I get it. If the legislature doesn't agree, they act one certain way. You said they didn't have the authority to do that. So okay, the only person, the only entity then, that can come in and say to the governor, we know you've got good faith, but we think you're wrong, this is not, in fact, an emergent condition or it is not a crisis condition would have to be a private citizen, wouldn't it?

MR. ALLEN: I think it -- that -- that would be the case, Your Honor. And again this is not --

JUDGE STEPHENS: Okay.

MR. ALLEN: This is the operation of the statute as it was written.

I believe that the legislature could have, and really still could decide that it didn't want the governor to -- it wanted to bar, by operation of law, and not mere resolution, her ability to declare an emergency as the statute otherwise, requires her to. It could have said the governor --

JUDGE STEPHENS: Okay. So you didn't -- so the resolution wasn't good.

If they had passed a statute as opposed to a resolution, and it would be a one-subject bill and the one-subject bill would be, there is no emergency, that would be valid?

MR. ALLEN: No. Your Honor, what I'm saying is, if the legislature built into the EMA, a prohibition on the governor's ability to reissue or to issue a new declaration based on substantially similar circumstances, they certainly could have done that. They did not do --

JUDGE STEPHENS: So what do we do about this? So your contention is the 28 days is a benchmark, but not a termination?

MR. ALLEN: Well, it is a termination, Your Honor, under the way the statute operates because the

executive order terminated. And the legislature defined state of disaster and state of emergency as executive orders. It's not, again, about this general idea about a state of disaster. It is a particular document. And she terminated that and thereafter, declared a new one because as the statute requires, she --

JUDGE STEPHENS: Because it occurred in a minute. Okay. I understand.

Is there anything more you want to say just about the EMA?

MR. ALLEN: I believe we've responded adequately to the Plaintiff's argument there.

JUDGE STEPHENS: Okay. Is there something you feel compelled to say in addition to the 200 pages you gave me, on the EMA? Or are we ready to go to the EMPG, the Emergency Powers of Governors Act?

MR. WILLIAMS: I will take your cue and offer only two very concise points. One of which is that the govern insists that she has the duty under the statute to continually and contradictorily declare and terminate and declare and terminate the states of disaster and emergency.

The duty says she has a duty to declare a state of emergency. That contemplates once, a duty to

declare, not multiple times, once, upon the existence of a disaster or emergency. So that duty was fulfilled when the governor first declared the state of emergency and state of disaster in the State of Michigan after COVID-19 arose here. It's not -- there's nothing to suggest that it is a continuing forever seriatim duty.

The other thing I think is important to note here, Your Honor, is that this -- there's an irony, I suppose, in the -- what the governor has declared our interpretation to be. Part of the absurdity, I think was the phrase. I think that it does not make any sense for the legislature to require the governor to contradict herself in mere seconds, by terminating and declaring states of emergency one after another as the governor insists she not only can do, but must do. And so for that reason, we would suggest that the EMA is not properly applied here.

JUDGE STEPHENS: Okay. So let's turn to the Emergency Powers of the Governor Act.

MR. WILLIAMS: And certainly -- oh, sorry, Your Honor.

JUDGE STEPHENS: One of the things I really would like to know is the language in the EMA which said that it did not diminish the powers in the EMPGA.

MR. WILLIAMS: Absolutely, Your Honor. And I

think that's telling because it's actually consistent with the legislature's position that these two Acts are meant to operate in separate lanes. I think it was a significant tell, Your Honor, when asked to engage with the EM -- EMA, the governor's default position was just to move to the EPGA. And that's because the governor is necessarily taking broad language that was meant to be confined to specific localized circumstances and using them to basically render the EMA, a redundancy.

But Your Honor, the language that says that the EMA is not meant to limit or abridge or otherwise modify the EPGA only works if the EPGA is properly confined to localized emergencies.

And as Your Honor saw from the legislative history, legislative history that was never disputed by the governor, the impetus for the EPGA, was localized concerns. In particular, at that time, rioting in the City of Detroit that had gotten out of the hand of local authorities and required more of the state level resources just by virtue of manpower, money, and the like.

Governor Milliken was effectively pleading for the EMA because he felt that the EPGA was so inadequate to respond to conditions on a statewide level.

And so, Your Honor, I think that the proviso, I guess I would call it the savings clause that says that the EMA doesn't modify, abridge, or suspend. That's just a recognition, again, that there are certain abilities that exist on a localized level that are not affected by the more statewide broader context of the EMA.

And I think that it's telling as well that the governor is calling these two statutes a belt-and-suspenders' approach. I think that that's just a nice analogy for redundancy. And of course, this Court has an obligation to ensure that statutes are not rendered redundant or surplusage, or whatever word you care to use.

The governor's broad construction of the EPGA necessarily renders, much if not all, at least for the governor's powers, entirely redundant. It's only the legislature's history-based focus that that ensures that the EMA is not then rendered redundant.

And it's not just the legislature, Your Honor. I would note that when the Executive Branch made a report to the CDC a few years ago about the Executive Branch's authority or Michigan -- the State of Michigan's authority to implement responses to pandemics, responses like social distancing, by name,

the EPGA barely warranted a mention. It was mentioned in passing as a reference to the ability to establish curfews. Again, curfews being a typical response to local civil unrest, local riots; the very things that were the focus point, and the reason why the actual events that are meant to be addressed by the EPGA.

So, Your Honor, all the legislature's asking the Court to do is to return the EPGA to its time-honored understanding, the one that was fully understood by every governor and every legislature up until this governor.

Remember, again, the legislature only could find one single instance where the EPGA was even employed in the last 43 years. And that was on a localized emergency based on, I believe, a winter storm in Southwest, Michigan.

So the governor's insistence that the EPGA has actually been lying in wait and grants these broad powers just is not consistent in the way in which that statute was implemented. It is not consistent in which the way the statute has been treated ever since. And it would not be consistent with the EMA's existence because it would render one or the other of those two provisions redundant.

And I would say it's exceptional to me that

in answering this argument, the governor's key response looked to be, we shouldn't use in pari materia, for instance, to interpret the language of the EPGA. It's an exceptional idea to me, that these two obviously intimately related statutes cannot be construed together. And when you do that, the reason why they're running away from in pari materia so, so quickly is because that canon makes clear that the legislature's localized understanding is the right one. We see that in the use of "area," for instance.

The EMA talks about area or areas, suggesting the State of Michigan contains more than one area. The whole state is not an area.

The EPGA also talks about zones, sections. It refers to local officials. And there's this balancing between disasters and emergencies that I always think shouldn't get lost. The EPGA talks about emergencies. The EMA talks about emergencies and disasters. But in defining the two of them, disasters are statewide. They're epidemics. It's named in the statutory definition of a disaster. I think the language of the definition actually refers to widespread. Emergencies on the other hand, are local circumstances that have merely escalated to the point where local resources are no longer enough to respond.

So again, that understanding of the E -- of emergency within the EMA can inform the understanding of how emergency was meant to operate in the EPGA and it reaffirms the legislature's tax-based history-focused contextual reading as the EPGA being limited to localized circumstances. And I think that --

JUDGE STEPHENS: And so you're not -- you don't believe that you're adding words to the actual text of the Act?

MR. WILLIAMS: No, Your Honor.

JUDGE STEPHENS: We talked about we don't want to render anything nugatory.

MR. WILLIAMS: Right.

JUDGE STEPHENS: Do we then, just because it says area, we decide that an area can't be the entire state because it doesn't say "the state?"

MR. WILLIAMS: Well, I think there's a few reasons why area could be interpreted to mean something less than the entire state. One is what I've just discussed in terms of the use of the area in the EMA, informing the intention of the use of the word "area" in EPGA. That's not a limitation. That's not a modification. That's merely using legislative action to inform an earlier understanding.

But I think it's also we are allowed to understand history in context. And the history in context, again, which was unanswered by the governor makes it so obvious that there was a localized focus in passing this legislation.

And, Your Honor, I think that the governor is kind of setting up something of a Stormont here. The legislature's position has never been that you just stick the 28-day provision onto the EPGA because we like the 28-day limitation. It's instead that these two statues occupy separate lanes and that a statewide declaration of the scale that we've seen through COVID-19 is simply not the type of situation that the EPGA was meant to address. So the EPGA never should have been triggered here at all. It's only the MEA that really is meant for the governor to take action as to those sorts of circumstances.

JUDGE STEPHENS: Do you want to address your assertion that if, in fact, it is applied, it is unconstitutional because it fails to have appropriate standards?

MR. WILLIAMS: Yes, Your Honor. And Your Honor's characterization is exactly right. This is an as-applied challenge. So we're not suggesting that the EPGA is entirely unconstitutional. If it had been

applied, for instance, to a riot in the City of Detroit as it was -- as, you know, in the 1940s, the situation that spurred its passage, then we, I don't think, would have any issue with this.

The problem is that when this degree of power is imposed statewide for an indefinite period of time because there is no temporal limitation in the EPGA, and only driven by the simple requirement that there be a gubernatorial determination that it's necessary, that that simply is not enough.

We see that, for instance, Your Honor in cases like Blue Cross Blue Shield v. Milliken. In that case, the governor ran away from it. And I understand exactly why. It's because in that case, the Court was grappling with a statute that required an administrative agency to pursue policies that were towards securing reasonable prices for insurance.

It's the same sort of indefinite aspirational policy goal that's articulated in the EPGA. That's not a workable definable standard. The proof is in the pudding, Your Honor.

Cases talk about the ability of a Court to measure the compliance of a -- of an executive officer with the standards that are put in place in the statutory text. And it would be very hard indeed, for

this Court to look at the standards that are implemented in the EPGA and say no, that one's not especially reasonable. That one's not especially necessary. I'm just not going to -- I don't agree with that. That's not a clear legal task. It's not clear legal standards. It's not the sort of articulation and clarity that this Court is used to applying in measuring executive decision making.

So for that reason, Your Honor, I think particularly given that these indefinite standards exist, and not only that, allow the governor to implement criminal sanctions for the citizens of Michigan based on her ambiguous determination that this indefinite state of emergency can exist based on, I guess the "ephemeral" word that was used by my Brother Counsel a minute ago -- that's a good word -- that there's a necessity that the governor has reached in her own mind. That, Your Honor, offends the separation of powers. And that particular application would, in fact, be a violation of the separation of powers for lack of standards.

JUDGE STEPHENS: Okay. Thank you.

MR. WILLIAMS: Thank you.

JUDGE STEPHENS: Mr. Allen.

MR. ALLEN: Your Honor, I'll start back with

the language of the EPGA, which I think is where we should start. Brother Counsel started with this history lesson about what prior governors believed that this law may have done. Now, we don't have a complete picture of what that means, but I think more importantly, how prior governors interpreted the law is of no moment. It's what the legislature interpreted when they wrote down the very words they did.

This is a bit of background. I would like to point this Court to the second and three sections in the EPGA 10.32, that in which the legislature made clear that it intended the words to be interpreted broadly to effectuate its purpose. And so, the -- the contrary arguments, the narrowing arguments that plaintiffs make here are not only inconsistent with the statute language, the sort of action language of the governor's authority, but contrary to the legislature's own stated intention of how this Court should interpret her authority, the governor's authority.

The -- I believe, Your Honor pointed to your definition of area. We gladly accept their definition, their dictionary definition of area because it would encompass the entire state. These other narrowing words are not about her authority. They're about suggestions about what a governor might do in

particular circumstances.

The actuating language in the EPGA is also broad. Great public crisis, disaster, similar public emergency within the state. That's what permits a governor to declare a state of emergency under the EPGA. It's difficult to understand within that language, how this is limited to local -- local uprisings, which is, although the Act may have been passed in the wake of uprising in Detroit, it does not mean that the language was only proclaimed to meet that precise circumstance.

And so, I think just reading the plain language of the text in conjunction with the requirement that the legislature put on courts to read its language broadly, its plain language broadly, gives us the answer about the governor's authority under the EPGA.

Now, the opposing counsel talks about in pari materia as being really essential here. But again, I would like to go back to the 1976 EMA statute that says that statute does not limit, modify, or abridge the governor's authority under the '45 Act, or more broadly, any other authority that she has or any governor has independent of the Act. And so, that's a clear recognition that these aren't supposed to be

interpreted as married together. One is atop the other. And insofar as they overlap, that is what the legislature intended. We look at the language that they use in both Acts and apply it.

I would like to also note that the -- the -- insofar as the plaintiffs wish to construe these statutes as being complementary, not overlapping at all, the EMA plainly authorizes states of emergency and disasters in localized areas. And so, their reading of the EPGA as being, you know, the local statute and the EMA being the broad, statewide statute is simply not borne out by the EMA -- the EMA's permission of acting locally.

The vast majority of the statute concerns local actors and how to deal with local emergencies and disasters and setting up the rubric for responding.

Unless Your Honor has any questions about the kind of textural transport of the EPGA, I'll move to the constitutional challenge.

JUDGE STEPHENS: Feel free.

MR. ALLEN: And the challenge here is one nominally, a separation of powers. And the plaintiffs have gone at length about the separation of powers, sort of in the abstract. But the -- to get right down to it, the -- this argument brings the legislature, and

perhaps this incorporates standing a little bit, the legislature is asking this Court to declare its own law unconstitutional. That in itself is very striking and a very telling indication about why we're really here. But that argument really, on the law is not worn out.

The standards that govern delegations from sharing power from one branch to the other, that's permitted under the state Constitution, federal constitutions, constitutions across this country. There is no bright line between the legislature and the Executive, insofar as they're permitted to share these authorities to make our government work.

And so, the courts have essentially distilled the rubric in how we look at whether a legislature has essentially gone too far. And it's to grant broad latitude to the legislature, broad entrustment to them, to know that they are permitted to delegate to the Executive. And so the standards must only be as reasonably precise as the subject matter requires or permits.

In public emergencies, whether it's a pandemic or a flood or some kind of other local or statewide response, they demand broad authority, not narrow nitpicking. Future emergencies are unknown and they're unknowable.

And the orders that the governor's declaration are -- excuse me. The orders issued pursuant to the governor's declaration are that it only be reasonable and directed at being held necessary to bring the emergency under control, necessary to protecting life and property, and only within the affected areas. And so the governor does not have a blank check here.

Indeed, as we've cited several cases in our brief, our courts have upheld substantially more vague language, whether it be necessary or good cause, things of those natures. Those have been upheld as sufficiently -- sufficiently guiding of the Executive, to guide their discretion.

And again, because this circumstance is temporary and because it requires latitude, the legislature saw fit to grant the governor that wide latitude while not making it unbounded. There's a reason that states across the country have similar schemes and are acting under them.

And again, Your Honor, if the legislature should want a different path of, you know, deliberation and Robert's Rules of Order, the legislature has the means to make the very changes they want to these laws in their own chamber. But the legislature of mere

past, they wisely recognized and properly delegated that emergency authority to the governor. And that's the law related to this non-delegation issue that they raise.

JUDGE STEPHENS: Okay. Thank you.

Do you have anything finally, sir?

MR. WILLIAMS: Briefly, Your Honor.

Just to address this first point that the legislature is attacking its own law as unconstitutional. I think that that's exceptionally misleading. I think we can look at circumstances, one of which was cited within the governor's brief themselves; the blank case where the governor signed a law and then turned around and sued to declare the same law unconstitutional. This is a function of our constitutional system that branches of government will sometimes question the constitutionality or the legality of Acts in which they were involved. That should not guide the analysis in any way.

More to the point, the legislature is not questioning the -- the application of its own law as unconstitutional. This is not a facial challenge. This is an as-applied challenge. It's the governor's broad construction of the statute, not the legislature's passage of that statute that poses the

constitutional problems in this case.

The governor accuses the legislature of creating a constitutional crisis on top of a public health crisis. But it's the governor's broad efforts and the governor's broad application of the statute that, in fact, creates the constitutional crisis. So in that way, we can put aside any kind of suggestion that this is disingenuous for the legislature to question the appropriateness. And the application of the statute --

JUDGE STEPHENS: Counsel, if this morphs into an as-applied analysis, an as-applied analysis, generally speaking, requires a determination of facts. And as I understood this, you were telling me that facially, these EOs were invalid because of various reasons. So if I'm left to, as-applied, I'm looking at arguably, whether or not the EOs and the facts meet. And I'm not taking testimony on facts. So help me.

MR. WILLIAMS: I think there's -- I think I used some sloppy language, so let me correct that.

It is not an as-applied challenge to the application of the EOs. It's a -- we are absolutely applying or challenging the EOs and the declaration of emergency and disaster on their face. What I'm suggesting, Your Honor, is that the constitutional

issues as to the EPGA are an as-applied challenge because in that, we're not suggesting that the EPGA in all of its applications would be unconstitutional.

Does that address Your Honor's concern?

JUDGE STEPHENS: I still don't think you want to say as-applied.

MR. WILLIAMS: Well, I think --

JUDGE STEPHENS: I think you want to tell me that this -- that the EPGA is being applied in a legally inconsistent manner that, therefore, you can see on its face. That from the language of the statute, it does not apply to the circumstance in the light most favorable to the Defendant.

MR. WILLIAMS: I think, Your Honor, there's a why Your Honor is on the bench. You just did a better job of articulating the argument I was trying to make, which is exactly right. Which, this is an overly broad, overextended construction by the governor. And --

JUDGE STEPHENS: So, Counsel, here's where I want you to focus my attention.

MR. WILLIAMS: Sure.

JUDGE STEPHENS: The EPGA says the governor may promulgate reasonable orders, rules and regulations as he or she considers necessary to protect life and

property or to bring the emergency situation within the affected area under control.

Let's look at Klammer versus Department of Transportation, where they said giving authority to administrative body to employ an individual for such period as was necessary. That necessary was a sufficient standard.

Why is it an insufficient standard in this case?

MR. WILLIAMS: I think the context is important, Your Honor. I think that the Sinard case, for instance, a case in which Justice Scalia was on, a three-judge panel, back when he was a circuit judge. It talks about the need for more definite and specific standards in guiding decision making when the grant of authority is, itself, broader. I haven't heard the governor challenge that proposition.

At the same time, they concede, I think the term that Counsel just used was the "actuating language within the statute is exceptionally broad."

So they can see that this is much different. For instance, in that case, we were talking about, I believe, the ability to manage state workers in handling retirement age.

Some of the other cases in which where the

governor's citing some rather ambiguous language include: Oversized loads on the freeway or the ability to revoke a business license. This is not the ability to exercise control over essentially every aspect of 10 million Michigander's lives.

So I think given the analysis found in Sinard and related authorities, there needs to be some more definite standard and some degree of greater clarity, particularly when the governor in insisting that she has unbridled discretion for which the way --

JUDGE STEPHENS: And if Sinard was in Michigan, we would be in a different space. But yes.

MR. WILLIAMS: Understood, Your Honor.

Of course, as I mentioned earlier, Michigan does look to federal authorities on occasion and interpret --

JUDGE STEPHENS: Not -- not to interpret the Michigan Constitution usually, but thank you.

MR. WILLIAMS: Fair enough.

JUDGE STEPHENS: Is there anything, even though this isn't the way we normally do it, anything else that the Defendant would wish to say? And I'll give you then your last chance, Mr. Williams, to indicate any additional items that you think should come to my attention.

Mr. Allen?

MR. ALLEN: Yes, Your Honor. Just a few quick points.

The context. Opposing counsel mentioned context as being important. And I think Michigan law makes clear that the nature and substance of the delegation is important in considering how much leeway the legislature is permitted to grant the Executive. And I don't think anyone would dispute that in emergency circumstances and disaster circumstances, leeway is the virtue of having -- of the legislature's wise decision to delegate this authority to the governor.

The Klammer case and the GF Redman case, and the others who we've cited in our brief, Your Honor, I think are the right guiding principles here. That the court system provides great leeway for the legislature to provide delegation. Certainly, there's a limit, but that limit is not effectuated here in this case.

In the Blue Cross Blue Shield decision that opposing counsel mentioned, the -- the Court in that case, looked at the language which required only that the actor, or the commissioner, I believe, approve or disapprove of certain risk factors. There was complete discretion. There was no guidance whatsoever. And so

Blue Cross, I think is a poor comparison. It might be the only law or the only case on the books that, in Michigan at least, that was a favorable or a non-delegation challenge that succeeded. It's exceedingly rare because the courts have recognized that the legislature generally knows how to delegate its authority while retaining, or while guiding the delegator sufficient guidance.

And I just wanted to point out one more about the discussion between as-applied and facial challenges here. The -- my understanding of a non-delegation challenge is, there's no as-applied non-delegation challenge. That's not how the doctrine works. It's about whether the statute has sufficient guidance or limitations on the authority. There's no as-applied delegation.

JUDGE STEPHENS: I don't think your colleagues substantially disagrees. Sometimes we get used to -- the language of doctors is more precise than that of lawyers. Let's put it that way.

So I think he agrees with you that it's a question of is there authority or is there not. Is it sufficient to meet constitutional muster? You have one analytical framework, he has another.

MR. ALLEN: Thank you, Your Honor.

JUDGE STEPHENS: Thank you, very much, sir.

Mr. Williams?

MR. WILLIAMS: Thank you, Your Honor.

I think when you look back at what Counsel just said, for instance, about the rarity of a nondelegation authority cases, and, you know, the Austinmer Charter Township case is just one other example I think issued before the Court of Appeals, declared that there was a delegation from the lack of standards. Actually, in that case, there were very similar standards to the ones that we're seeing here.

It gives sort of an ambiguous task to the lower authority and says go for it. And I think that's in some sense what we're dealing with here.

But at a broader level, Your Honor, I think that even at a time of crisis, we have to remember that the language of the law needs to prevail. And these cases really clearly require the legislature to give some guidance and guardrails, some direction to the execution of authority. And though Counsel's suggesting that there's Michigan authorities suggesting that you can almost dispense with the guardrails because of the complexities of dealing with a pandemic, respectfully, Your Honor, I think that would be inconsistent with the way that our constitutional

system conceives of the separation of powers doctrine.

So for those reasons, Your Honor, I think this application and this use of the EPGA here remains problematic. And it's only in adopting the construction that the legislature offers, that the Court would avoid having to reach those difficult constitutional questions in their entirety.

So for those reasons, Your Honor, we would just ask that Your Honor declare the declarations of state of emergency and disaster invalid and improper, and its ultra vires acts unsustained by the Constitution or statute.

JUDGE STEPHENS: Thank you, very much. The -- Ms. Mapp, do you know when we are likely to have a transcript.

THE COURT REPORTER: Whenever you need it, I can have it ready.

JUDGE STEPHENS: They needed it yesterday, before they even opened their mouths. If I could get it by Tuesday of next week, I'd be deeply appreciative.

THE COURT REPORTER: Okay.

JUDGE STEPHENS: Thank you, very much.

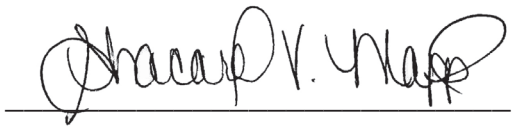
And with that, this session of the Court of Claims will conclude.

(The proceeding was concluded at 11:14 a.m.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Shacara V. Mapp, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth; that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.



Shacara V. Mapp, CSR-9305
Notary Public,
Macomb County, Michigan

My Commission expires: 07-25-2024

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Executive Order 2020-66 (COVID-19)

EXECUTIVE ORDER

No. 2020-66

Termination of the states of emergency and disaster declared under the Emergency Management Act in Executive Order 2020-33

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. The virus's rapid and relentless spread threatened to quickly overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals. And the virus had also brought deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I have issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I have also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I have taken steps to begin building the public health infrastructure in this state that is necessary to contain the infection.

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 41,379 confirmed cases of COVID-19 in Michigan, and 3,789 deaths from the disease—fourfold and tenfold increases, respectively, since the start of this month. And there are still countless more who are infected but have not yet been tested. There remains no treatment for the virus; it remains exceptionally easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster.

The economic and social harms from this pandemic likewise persist. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: to date, roughly one quarter of the eligible workforce has filed for unemployment. And state revenue, used to fund many essential services such as our schools, has dropped sharply.

The economic damage—already severe—will continue to compound with time. Between March 15 and April 18, Michigan had 1.2 million initial unemployment claims —the fifth-highest nationally, amounting to nearly 24% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression. On April 9, 2020, economists at the University of Michigan forecasted that the U.S. economy will contract by 7% in the second quarter of this year, or roughly an annualized rate of 25%. As a result, many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Although local health departments have some limited capacity to respond to cases as they arise within their jurisdiction, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hotspots as they arise. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe.

Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work, which would undermine infection control and contribute to further spread of the virus. Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency" and/or a "state of disaster" upon finding that an emergency and/or disaster has occurred or is threatening to occur. MCL 30.403(3) & (4). The Emergency Management Act further provides that a declared state of emergency or disaster shall continue until the governor finds that the threat or danger has passed, the [disaster/emergency] has been dealt with to the extent that [disaster/ emergency] conditions no longer exist, or until the declared state of [disaster/ emergency] has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of [disaster/ emergency] terminated, unless a request by the governor for an extension of the state of [disaster/emergency] for a specific number of days is approved by resolution of both houses of the legislature. [*Id.*]

For the reasons set forth above, the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist. Twenty-eight days, however, have elapsed since I declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33. And while I have sought the legislature's agreement that these declared states of emergency and disaster should be extended, the legislature—despite the clear and ongoing danger to the state—has refused to extend them beyond today.

Accordingly, acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The state of emergency declared under the Emergency Management Act in Executive Order 2020-33 is terminated.

2. The state of disaster declared under the Emergency Management Act in Executive Order 2020-33 is terminated.

Given under my hand and the Great Seal of the State of Michigan.

Executive Order 2020-70 (COVID-19)

EXECUTIVE ORDER

No. 2020-70

Temporary requirement to suspend activities that are not necessary to sustain or protect life

Rescission of Executive Order 2020-59

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the weeks that followed, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued

Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42 and 2020-59, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by Executive Orders 2020-21, 2020-42, and 2020-59 have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on April 30, 2020, Michigan reported 41,379 confirmed cases and 3,789 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-59 and amend their scope. With Executive Order 2020-59, I ordered that certain previously suspended work and activities could resume, based on an evaluation of public health metrics and an assessment of the statewide risks and benefits. That evaluation remains ongoing, and based upon it, I find that we will soon be positioned to allow another segment of previously suspended work to resume. This work is permitted to resume on May 7, 2020, and includes

construction, real-estate activities, and work that is traditionally and primarily performed outdoors. This work, like the resumed activities allowed under Executive Order 2020-59, will be subject to stringent precautionary measures. This partial and incremental reopening will allow my public health team to evaluate the effects of allowing these activities to resume, to assess the capacity of the health care system to respond adequately to any increases in infections, and to prepare for any increase in patients presenting to a health-care facility or provider. With this order, Executive Order 2020-59 is rescinded. This order will remain in effect until May 15, 2020.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.
2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.
3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.
4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.
    a. For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this order.
    b. For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 11 of this order.

c. Workers who perform resumed activities are defined in section 10 of this order.

5. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:

   a. Consistent with sections 8, 9, and 10 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:

      1. Workers in health care and public health.
      2. Workers who perform necessary government activities, as described in section 6 of this order.
      3. Workers and volunteers described in section 9(d) of this order.

   b. In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.

   c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 11 of this order. Stores that are open for in-person sales must also adhere to the rules described in section 12 of this order.

   d. Any business or operation that employs workers who perform resumed activities under section 10(a) of this order, but that does not sell necessary

supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.

6. All in-person government activities at whatever level (state, county, or local) are suspended unless:
    a. They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 8 and 9 of this order.
    b. They are performed by workers who are permitted to resume work under section 10 of this order.
    c. They are necessary to support the activities of workers described in sections 8, 9, and 10 of this order, or to enable transactions that support businesses or operations that employ such workers.
    d. They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.
    e. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.
    f. Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 11 of this order.
7. Exceptions.
    a. Individuals may leave their home or place of residence, and travel as necessary:
        1. To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.
        2. To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)

3. To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.
4. To perform resumed activities, as described in section 10 of this order, after being designated to perform such work by their employers.
5. To perform necessary government activities, as described in section 6 of this order.
6. To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including in-person procedures or veterinary services that, in accordance with a duly implemented non-essential procedure or veterinary services postponement plan, have not been postponed).
7. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.
    A. Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences or motor vehicles.
    B. Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 9(i) of this order, or to have a motor vehicle or bicycle repaired or maintained.
    C. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.
8. To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.
9. To care for a family member or a family member's pet in another household.
10. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

11. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.
12. To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.
13. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.
14. To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
15. To attend a funeral, provided that no more than 10 people are in attendance.
16. To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.
17. To view a real-estate listing by appointment, as permitted under section 10(h) of this order.

b. Individuals may also travel:

1. To return to a home or place of residence from outside this state.
2. To leave this state for a home or residence elsewhere.
3. Between two residences in this state, including moving to a new residence.
4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

c. All other travel is prohibited, including all travel to vacation rentals.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available **here**). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

a. Health care and public health.
b. Law enforcement, public safety, and first responders.
c. Food and agriculture.
d. Energy.
e. Water and wastewater.
f. Transportation and logistics.
g. Public works.
h. Communications and information technology, including news media.
i. Other community-based government operations and essential functions.
j. Critical manufacturing.
k. Hazardous materials.
l. Financial services.
m. Chemical supply chains and safety.
n. Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:
    a. Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.
    b. Workers at suppliers, distribution centers, or service providers, as described below.
        1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.
4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

c. Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

d. Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

e. Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.

g. Workers at laundromats, coin laundries, and dry cleaners.

h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.

i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. For purposes of this order, workers who perform resumed activities are defined as follows:

a. Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.

b. Workers who perform bicycle maintenance or repair.

c. Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.

d. Maintenance workers and groundskeepers who are necessary to maintain the safety and sanitation of places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it, provided that the places and their workers do not provide goods, equipment, supplies, or services to individuals, and subject to the enhanced social-distancing rules described in section 11(h) of this order.

e. Workers for moving or storage operations, subject to the enhanced social-distancing rules described in section 11(h) of this order.

f. Effective at 12:01 am on May 7, 2020, and subject to the enhanced social-distancing rules described in section 11(h) of this order, workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and similar workers.

g. Effective at 12:01 am on May 7, 2020, workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), subject to the enhanced social-distancing rules described in section 11(i) of this order.

h. Effective at 12:01 am on May 7, 2020, workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:

1. Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be

limited to no more than four people on the premises at any one time. No in-person open houses are permitted.

2. Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.

i. Effective at 12:01 am on May 7, 2020, workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.

11. Businesses, operations, and government agencies that remain open for in-person work must, at a minimum:

a. Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available **here**. Such plan must be available at company headquarters or the worksite.

b. Restrict the number of workers present on premises to no more than is strictly necessary to perform the in-person work permitted under this order.

c. Promote remote work to the fullest extent possible.

d. Keep workers and patrons who are on premises at least six feet from one another to the maximum extent possible.

e. Increase standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

f. Adopt policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.

g. Adopt any other social distancing practices and mitigation measures recommended by the CDC.

h. Businesses or operations whose in-person work is permitted under sections 10(c) through 10(f) of this order must also:

1. Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.

2. Limit in-person interaction with clients and patrons to the maximum extent possible, and barring any such interaction in which people cannot maintain six feet of distance from one another.
3. Provide personal protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.
4. Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning of tools, equipment, and frequently touched surfaces.

i. Businesses or operations in the construction industry must also:

1. Adhere to all of the provisions in subsection (h) of this section.
2. Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies developed under subsection (a) of this section. The supervisor must remain on-site at all times during activities. An on-site worker may be designated to perform the supervisory role.
3. Conduct a daily entry screening protocol for workers and visitors entering the worksite, including a questionnaire covering symptoms and exposure to people with possible COVID-19, together with, if possible, a temperature screening.
4. Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in subprovision (3) of this subsection, or in the alternative issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.
5. Require face shields or masks to be worn when workers cannot consistently maintain six feet of separation from other workers.
6. Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled masks.
7. Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
8. Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.

9. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
10. Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
11. Restrict unnecessary movement between project sites.
12. Create protocols for minimizing personal contact upon delivery of materials to the worksite.

12. Any store that remains open for in-store sales under section 9(f) or section 10(c) of this order:
    a. Must establish lines to regulate entry in accordance with subsection (b) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.
    b. Must adhere to the following restrictions:
        1. For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.
        2. For stores of more than 50,000 square feet, must:
            A. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.
            B. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.
        3. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.
    c. May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.

d. Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.

14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.

15. Rules governing face coverings.

    a. Any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.

    b. All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.

    c. Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.

    d. The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.

16. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place. No individual is subject to penalty under section 20 of this order for violating section 15(a) of this order.

17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

18. This order takes effect immediately, unless otherwise specified in this order, and continues through May 15, 2020 at 11:59 pm. Executive Order 2020-59 is

rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

19. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.
20. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Gretchen Whitmer, Governor

Date: May 1, 2020
Time: 2:49 pm

Related Documents
EO 2020-70 MI Safe Start

POLICIES

Executive Order 2020-70 FAQs

The most up-to-date guidance on these and other mitigation strategies is available at Michigan.gov/Coronavirus.
This matter is rapidly evolving and MDHHS may provide updated guidance.

Executive Order 2020-70
Temporary requirement to suspend activities that are not necessary to sustain or protect life - Rescission of Executive Order 2020-59

Q: How does this order impact custody agreements / how does this order impact parents' visits with their children placed in foster care?

A: Under section 7(b)(4) of the order, individuals may travel as required by law enforcement or a court order, including the transportation of children pursuant to a Friend of the Court custody agreement. Court-ordered parent-child visits related to a child custody arrangement continue, but these visits need not always be in person. Alternatives including telephone and videoconference are acceptable.

Visits between a child and parent while a child resides in foster care should be conducted by telephone and videoconference or other such technology, whenever possible. Under section 7(a)(12) of the order, travel is permissible to visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan. When agreement cannot be reached by all three parties, exception requests must be approved by the Executive Director of the Children's Services Agency. In-person visits at a child caring institution need not occur unless a court order requires in-person contact to occur and it can be safely facilitated.

Q: Can pet grooming services be provided?

A: No. Grooming supplies may be sold by any store remotely for curbside pickup or delivery, and may also be sold in-store by stores that also sell necessary supplies (such as grocery stores). Grooming services, however, remain prohibited because they require in-person work not permitted by the order.

Q: Are in-person collection activities such as repossession included in the definition of financial services for the purposes of Executive Order 2020-70?

A: No.

Q: Are funerals allowed under Executive Order 2020-70?

A: Yes. Under the order people may leave their home to attend a funeral, provided that no more than 10 people are in attendance. This applies to all funeral-related activities.

Q: Does Executive Order 2020-70 restrict the exercise of tribal treaty rights?

A: No. Executive Order 2020-70 does not restrict activities by tribal members to exercise their federal treaty rights within the boundaries of their treaty territory (also known as "ceded territory"). These activities may be subject to restrictions imposed by tribal authorities.

Q: Are stores prohibited from advertising under Executive Order 2020-70?

A: No.

Q: Does traveling to and attending a religious service in a parking lot of a place of religious worship with congregants remaining in their own vehicles constitute an activity subject to penalty under section 20 of the order?

A: No.

Q: Can vehicles under an existing contract be delivered to police departments?

A: Yes. Workers at auto dealerships are allowed to leave the home for work as necessary to facilitate remote transactions and to deliver cars to customers. Under the order, all work must be carried out remotely to the greatest extent possible, and any in-person work that is permitted must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Does Executive Order 2020-70 prohibit persons from engaging in outdoor activities that are protected by the First Amendment to the United States Constitution?

A: No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, but must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the person's household.

Q: May a company that performs oil changes and other routine automotive maintenance services provide those services in person to the public?

A. Yes. Workers that provide auto repair and maintenance services constitute critical infrastructure workers and may perform that work in person as needed. All work under the order must be performed remotely to the greatest extent possible, and any in-person work must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Can security companies and security guards continue to operate?

A: Under the order, workers are permitted to leave their home for work if their in-person presence is strictly necessary to conduct the minimum basic operations of a business under section 4(b) of the order, which includes ensuring security. Some security workers may also constitute critical infrastructure workers under section 8 or section 9(b) of the order. Security workers who have been properly designated for in-person work under any of these criteria may leave their home to perform that work as

needed. All work under the order must be performed remotely to the greatest extent possible, and any in-person work must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Can law firms, attorney offices and legal aid clinics continue in-person activities?

A: Generally, no. Attorneys do not constitute "critical infrastructure workers" and thus may not leave their homes for work unless, under section 9(d) of the order, they are "provid[ing] food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities." This is a tightly circumscribed category that captures only work that must be carried out in person and is absolutely necessary to assist those with a genuine and emergent need. All work under the order must be performed remotely to the greatest extent possible, and any in-person work must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Is bottle return an essential service?

A: Although bottle return services are often located within grocery and convenience stores, they are not considered critical infrastructure. There will be no change in the deposit collected at the time of purchase during this temporary suspension of bottle return services.

Q: Does in-person work that is essential to sustain or protect human life also include in-person work to prevent severe psychological harm?

A: Yes.

Q: Are automotive dealership workers considered critical infrastructure und Executive Order 2020-70?

A: Under Executive Order 2020-70, showrooms of automotive dealerships are closed, but the automotive repair and maintenance components of a dealership can remain open for in-person work. Additionally, workers at auto dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver automobiles to customers are permitted. All work under the order must be performed remotely to the greatest extent possible, and any in-person work must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Are childcare workers considered critical infrastructure employees?

A: Childcare workers are considered critical infrastructure workers but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities, as defined under the order.

Q: Under the Stay Home, Stay Safe Executive Order, can school districts continue to provide food service for students?

A: Gov. Whitmer is committed to ensuring that Michigan students have access to the food they need during the COVID-19 pandemic. Under the governor's executive order, K-12 school food services are considered critical infrastructure and should continue.

Q: Do I need to carry credentials or any paperwork that indicates I've been designated a critical infrastructure employee or to travel to and from my home or residence?

A: No, there is not a requirement under Executive Order 2020-70 to carry credentials or paperwork with you under any circumstance.

Q: Can hardware stores remain open?

A: Yes. Workers at hardware stores are considered part of the critical infrastructure workforce. Under the order, all work must be carried out remotely to the greatest extent possible, and any in-person work that is permitted must be done in accordance with the mitigation measures required under section 11 of the order. Stores must also adhere to the additional requirements imposed by section 12 of the order.

Q: Are tobacco shops, cigar bars, vape shops, and hookah lounges able to stay open to the public under EO 2020-70?

A: No, employees at these businesses are not critical infrastructure workers, and they may not be designated to leave their homes to provide goods or services to the public. As needed, however, a business may designate workers to leave their homes for work if their in-person presence is strictly necessary to conduct the minimum basic operations listed in section 4(b) of the order. Minimum basic operations do not include serving members of the public. Under the order, all work must be carried out remotely to the greatest extent possible, and any in-person work that is permitted must be done in accordance with the mitigation measures required under section 11 of the order.

Q: May members of the media continue to have access to the station to relay news?

A: Yes. Employees responsible for disseminating news are "critical infrastructure workers," as indicated in section 8(h) of the order, and they may be designated to leave their homes for that work as needed. Under the order, all work must be carried out remotely to the greatest extent possible, and any in-person work that is permitted must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Are massage spas allowed to be open to provide services to members of the public under the Executive Order?

A: No, employees at these businesses are not critical infrastructure workers, and they may not be designated to leave their homes to provide services to the public. As needed, a business may designate workers to leave their homes for work if their in-person presence is strictly necessary to conduct the minimum basic operations listed in section 4(b) of the order. Minimum basic operations do not include serving

members of the public. A business may also designate workers whose in-person presence is necessary to process and fulfill remote orders for any goods (but not services) that the business may offer, via delivery or curbside pickup. Under the order, all work must be carried out remotely to the greatest extent possible, and any in-person work that is permitted must be done in accordance with the mitigation measures required under section 11 of the order.

Q: Do businesses or operations who employ critical infrastructure workers still need to designate suppliers, distribution centers, or service providers in order to keep them in operation?

A: No. Suppliers, distribution centers, and service providers that are necessary to critical infrastructure work can now designate their own workers as critical infrastructure workers. They may do so, however, only to the extent necessary to support critical infrastructure work up the supply chain. They may also designate workers whose in-person presence is necessary to conduct minimum basic operations or to process and fulfill remote orders for curbside pick-up or delivery. If a worker is not needed in person to support such work, he or she may not be designated.

Q: Does the order prohibit a recreational ride on a motorcycle?

A: No. Like all outdoor recreational activity, however, it must be done in a manner consistent with remaining at least six feet from people outside the individual's household, and riders are strongly encouraged to follow all other mitigation measures recommended by the CDC to suppress the spread of COVID-19.

RELATED CONTENT

Executive Order 2020-73 FAQs

Executive Order 2020-65 FAQs

Executive Order 2020-69 FAQs

Executive Order 2020-59 FAQs (No longer effective)

Executive Order 2020-50 FAQs

Executive Order 2020-48 FAQs

Executive Order 2020-43 FAQs (No longer effective)

Executive Order 2020-40 FAQs (No longer effective)

Executive Order 2020-35 FAQs (No longer effective)

Executive Order 2020-42 FAQs (No longer effective)

Executive Order 2020-37 FAQs (No longer effective)

Executive Order 2020-17 FAQs

Executive Order 2020-21 FAQs [No longer effective]

Executive Order 2020-20 FAQs [No longer effective]

Executive Order 2020-11 FAQs [No longer effective]

Executive Order 2020-10 FAQs [No longer effective]

Executive Order 2020-07 FAQs [No longer effective]

Executive Order 2020-05 FAQs [No longer effective]

Executive Order 2020-09 FAQs [No longer effective]

Executive Order 2020-96 FAQs

The most up-to-date guidance on these and other mitigation strategies is available at **Michigan.gov/Coronavirus**.
This matter is rapidly evolving and MDHHS may provide updated guidance.

Executive Order, 2020-96
Temporary requirement to suspend certain activities that are not necessary to sustain or protect life - Rescission of Executive Orders 2020-17, 2020-34, and 2020-92

Q: May campgrounds remain open for public use under Executive Order 2020-96 ?

A: In general, no. Recreational camping at campgrounds who rent to individuals who otherwise have a primary residence and are traveling to the campground for non-COVID-19-related purposes are not permitted under this order. However, in some limited cases, workers at campgrounds may be critical infrastructure workers to the extent they "provide temporary or permanent housing for… shelter … for … otherwise needy individuals." For purposes of the order, the term "otherwise needy individuals" includes anyone residing in a campground at the time the order was issued or anyone seeking shelter during the current pandemic. They may also remain open to the extent they are used for COVID-19 mitigation and containment efforts and to serve critical infrastructure workers.

If a licensed campground serves in the above capacity, it may only engage in activities to provide shelter and basic needs. In engaging in those activities, it must limit guest-to-guest, guest-to-staff, and staff-to-staff interactions as much as possible and must adopt all other workplace safeguards required by Executive Order 2020-97. It may not provide additional on-site amenities such as gyms, pools, spas, entertainment facilities, meetings rooms, or like facilities, or provide in-house dining.

Q: Is bottle return an essential service?

A: Although bottle return services are often located within grocery and convenience stores, they are not considered critical infrastructure. There will be no change in the deposit collected at the time of purchase during this temporary suspension of bottle return services.

Q: Does Executive Order 2020-96 prohibit persons from engaging in outdoor activities that are protected by the First Amendment to the United States Constitution?

A: No. Persons may engage in expressive activities protected by the First Amendment within the State of Michigan, but must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the person's household.

Q: Does traveling to and attending a religious service in a parking lot of a place of religious worship with congregants remaining in their own vehicles constitute an activity subject to penalty under section 20 of the order?

A: No.

Q: How does this order impact custody agreements / how does this order impact parents' visits with their children placed in foster care?

A: Under section 8(b)(4) of the order, individuals may travel as required by law enforcement or a court order, including the transportation of children pursuant to a Friend of the Court custody agreement. Court-ordered parent-child visits related to a child custody arrangement continue, but these visits need not always be in person. Alternatives including telephone and videoconference are acceptable.

Visits between a child and parent while a child resides in foster care should be conducted by telephone and videoconference or other such technology, whenever possible. Under section 8(a)(12) of the order, travel is permissible to visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan. When agreement cannot be reached by all three

parties, exception requests must be approved by the Executive Director of the Children's Services Agency. In-person visits at a child caring institution need not occur unless a court order requires in-person contact to occur and it can be safely facilitated.

Q: Can law firms, attorney offices and legal aid clinics continue in-person activities or remote activities on legal matters within a law office?

A: Generally, no. Attorneys are only allowed to work outside the home or meet in-person with clients to extent that they cannot perform the work remotely or cannot comply with their ethical obligations by performing the work remotely. All work under the order must be performed remotely to the greatest extent possible, and any in-person work must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-97 and any orders that may follow from it.

Q: Are childcare workers considered critical infrastructure employees?

A: Childcare workers are considered critical infrastructure workers but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities, as defined under the order.

Q: Does Executive Order 2020-96 restrict the exercise of tribal treaty rights?

A: No. Executive Order 2020-96 does not restrict activities by tribal members to exercise their federal treaty rights within the boundaries of their treaty territory (also known as "ceded territory"). These activities may be subject to restrictions imposed by tribal authorities.

Q: Are in-person collection activities such as repossession included in the

definition of financial services for the purposes of Executive Order 2020-96 ?

A: No.

Q: Are funerals allowed under Executive Order 2020-96?

A: Yes. Under the order people may leave their home to attend a funeral, provided that no more than 10 people are in attendance. This applies to all funeral-related activities.

Q: Are stores prohibited from advertising under Executive Order 2020-96 ?

A: No.

Q: Does in-person work that is essential to sustain or protect human life also include in-person work to prevent severe psychological harm?

A: Yes.

Q: Under Executive Order 2020-96, can school districts continue to provide food service for students?

A: Governor Whitmer is committed to ensuring that Michigan students have access to the food they need during the COVID-19 pandemic. Under the order, K-12 school food services are considered critical infrastructure and should continue.

Q: Do I need to carry credentials or any paperwork that indicates I've been designated a critical infrastructure employee or to travel to and from my home or residence?

A: No, there is not a requirement under Executive Order 2020-96 to carry credentials or paperwork with you under any circumstance.

RELATED CONTENT

Executive Order 2020-92 FAQs

Executive Order 2020-84 FAQs

Executive Order 2020-77 FAQs (No longer effective)

Executive Order 2020-75 FAQs

Executive Order 2020-73 FAQs

Executive Order 2020-70 FAQs (No longer effective)

Executive Order 2020-65 FAQs

Executive Order 2020-69 FAQs

Executive Order 2020-59 FAQs (No longer effective)

Executive Order 2020-50 FAQs (No longer effective)

Executive Order 2020-48 FAQs (No longer effective)

Executive Order 2020-43 FAQs (No longer effective)

Executive Order 2020-40 FAQs (No longer effective)

Executive Order 2020-35 FAQs (No longer effective)

Executive Order 2020-42 FAQs (No longer effective)

Executive Order 2020-37 FAQs (No longer effective)

Executive Order 2020-17 FAQs

Executive Order 2020-21 FAQs [No longer effective]

Executive Order 2020-20 FAQs [No longer effective]

Executive Order 2020-11 FAQs [No longer effective]

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EXECUTIVE ORDER

No. 2020-97

Safeguards to protect Michigan's workers from COVID-19

Rescission of Executive Order 2020-91

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We have now begun the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

In particular, businesses must do their part to protect their employees, their patrons, and their communities. Many businesses have already done so by implementing robust safeguards to prevent viral transmission. But we can and must do more: no one should feel unsafe at work. With Executive Order 2020-91, I created an enforceable set of workplace standards that apply to all businesses across the state. I am now amending those standards to include new provisions governing outpatient health-care facilities.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. All businesses or operations that are permitted to require their employees to leave the homes or residences for work under Executive Order 2020-92, and any order that follows it, must, at a minimum:

   (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available here. By June 1, 2020, or within two weeks of resuming in-person activities, whichever is later, a business's or operation's plan must be made readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy.

   (b) Designate one or more worksite supervisors to implement, monitor, and report on the COVID-19 control strategies developed under subsection (a). The supervisor must remain on-site at all times when employees are present on site. An on-site employee may be designated to perform the supervisory role.

   (c) Provide COVID-19 training to employees that covers, at a minimum:

(1) Workplace infection-control practices.

(2) The proper use of personal protective equipment.

(3) Steps the employee must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.

(4) How to report unsafe working conditions.

(d) Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.

(e) Keep everyone on the worksite premises at least six feet from one another to the maximum extent possible, including through the use of ground markings, signs, and physical barriers, as appropriate to the worksite.

(f) Provide non-medical grade face coverings to their employees, with supplies of N95 masks and surgical masks reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers.

(g) Require face coverings to be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace.

(h) Increase facility cleaning and disinfection to limit exposure to COVID-19, especially on high-touch surfaces (e.g., door handles), paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).

(i) Adopt protocols to clean and disinfect the facility in the event of a positive COVID-19 case in the workplace.

(j) Make cleaning supplies available to employees upon entry and at the worksite and provide time for employees to wash hands frequently or to use hand sanitizer.

(k) When an employee is identified with a confirmed case of COVID-19, within 24 hours, notify both:

(1) The local public health department, and

(2) Any co-workers, contractors, or suppliers who may have come into contact with the person with a confirmed case of COVID-19.

(l) An employer will allow employees with a confirmed or suspected case of COVID-19 to return to the workplace only after they are no longer infectious according to

the latest guidelines from the Centers for Disease Control and Prevention ("CDC").

(m) Follow Executive Order 2020-36, and any executive orders that follow it, that prohibit discharging, disciplining, or otherwise retaliating against employees who stay home or who leave work when they are at particular risk of infecting others with COVID-19.

(n) Establish a response plan for dealing with a confirmed infection in the workplace, including protocols for sending employees home and for temporary closures of all or part of the worksite to allow for deep cleaning.

(o) Restrict business-related travel for employees to essential travel only.

(p) Encourage employees to use personal protective equipment and hand sanitizer on public transportation.

(q) Promote remote work to the fullest extent possible.

(r) Adopt any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.

2. Businesses or operations whose work is primarily and traditionally performed outdoors must:

(a) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.

(b) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.

(c) Provide and require the use of personal protective equipment such as gloves, goggles, face shields, and face coverings, as appropriate for the activity being performed.

(d) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.

3. Businesses or operations in the construction industry must:

(a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

(b) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in sub-provision (b) of this section, or in the alternative issue stickers or other indicators to employees to show that they received a screening before entering the worksite that day.

(c) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled face coverings.

(d) Require the use of work gloves where appropriate to prevent skin contact with contaminated surfaces.

(e) Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.

(f) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees.

(g) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among employees at the worksite.

(h) Restrict unnecessary movement between project sites.

(i) Create protocols for minimizing personal contact upon delivery of materials to the worksite.

4. Manufacturing facilities must:

(a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.

(b) Create dedicated entry point(s) at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.

(c) Suspend all non-essential in-person visits, including tours.

(d) Train employees on, at a minimum:

(1) Routes by which the virus causing COVID-19 is transmitted from person to person.

(2) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.

(3) The use of personal protective equipment, including the proper steps for putting it on and taking it off.

(e) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.

(f) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of employees in the facility at the same time.

(g) Stagger meal and break times, as well as start times at each entrance, where possible.

(h) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.

(i) Create protocols for minimizing personal contact upon delivery of materials to the facility.

(j) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.

(k) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees, and discontinue use of hand dryers.

(l) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic employees or employees who received a positive test for COVID-19.

(m) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.

(n) Require employees to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.

(o) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if an employee goes home because he or she is displaying symptoms of COVID-19.

5. Research laboratories, but not laboratories that perform diagnostic testing, must:

(a) Assign dedicated entry point(s) and/or times into lab buildings.

(b) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire

covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

(c) Create protocols and/or checklists as necessary to conform to the facility's COVID-19 preparedness and response plan under section 1(a).

(d) Suspend all non-essential in-person visitors (including visiting scholars and undergraduate students) until further notice.

(e) Establish and implement a plan for distributing face coverings.

(f) Limit the number of people per square feet of floor space permitted in a particular laboratory at one time.

(g) Close open workspaces, cafeterias, and conference rooms.

(h) As necessary, use tape on the floor to demarcate socially distanced workspaces and to create one-way traffic flow.

(i) Require all office and dry lab work to be conducted remotely.

(j) Minimize the use of shared lab equipment and shared lab tools and create protocols for disinfecting lab equipment and lab tools.

(k) Provide disinfecting supplies and require employees to wipe down their work stations at least twice daily.

(l) Implement an audit and compliance procedure to ensure that cleaning criteria are followed.

(m) Establish a clear reporting process for any symptomatic individual or any individual with a confirmed case of COVID-19, including the notification of lab leaders and the maintenance of a central log.

(n) Clean and disinfect the work site when an employee is sent home with symptoms or with a confirmed case of COVID-19.

(o) Send any potentially exposed co-workers home if there is a positive case in the facility.

(p) Restrict all non-essential work travel, including in-person conference events.

6. Retail stores that are open for in-store sales must:

(a) Create communications material for customers (e.g., signs or pamphlets) to inform them of changes to store practices and to explain the precautions the store is taking to prevent infection.

(b) Establish lines to regulate entry in accordance with subsection (c) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.

(c) Adhere to the following restrictions:

(1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal. Stores of more than 50,000 square feet must:

(A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.

(B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

(2) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.

(d) Post signs at store entrance(s) instructing customers of their legal obligation to wear a face covering when inside the store.

(e) Post signs at store entrance(s) informing customers not to enter if they are or have recently been sick.

(f) Design spaces and store activities in a manner that encourages employees and customers to maintain six feet of distance from one another.

(g) Install physical barriers at checkout or other service points that require interaction, including plexiglass barriers, tape markers, or tables, as appropriate.

(h) Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts, and other surfaces.

(i) Train employees on:

(1) Appropriate cleaning procedures, including training for cashiers on cleaning between customers.

(2) How to manage symptomatic customers upon entry or in the store.

(j) Notify employees if the employer learns that an individual (including a customer or supplier) with a confirmed case of COVID-19 has visited the store.

(k) Limit staffing to the minimum number necessary to operate.

7. Offices must:

(a) Assign dedicated entry point(s) for all employees to reduce congestion at the main entrance.

(b) Provide visual indicators of appropriate spacing for employees outside the building in case of congestion.

(c) Take steps to reduce entry congestion and to ensure the effectiveness of screening (e.g., by staggering start times, adopting a rotational schedule in only half of employees are in the office at a particular time).

(d) Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.

(e) Increase distancing between employees by spreading out workspaces, staggering workspace usage, restricting non-essential common space (e.g., cafeterias), providing visual cues to guide movement and activity (e.g., restricting elevator capacity with markings, locking conference rooms).

(f) Turn off water fountains.

(g) Prohibit social gatherings and meetings that do not allow for social distancing or that create unnecessary movement through the office.

(h) Provide disinfecting supplies and require employees wipe down their work stations at least twice daily.

(i) Post signs about the importance of personal hygiene.

(j) Disinfect high-touch surfaces in offices (e.g., whiteboard markers, restrooms, handles) and minimize shared items when possible (e.g., pens, remotes, whiteboards).

(k) Institute cleaning and communications protocols when employees are sent home with symptoms.

(l) Notify employees if the employer learns that an individual (including a customer, supplier, or visitor) with a confirmed case of COVID-19 has visited the office.

(m) Suspend all nonessential visitors.

(n) Restrict all non-essential travel, including in-person conference events.

8. Restaurants and bars must:

   (a) Limit capacity to 50% of normal seating.

   (b) Require six feet of separation between parties or groups at different tables or bar tops (e.g., spread tables out, use every other table, remove or put up chairs or barstools that are not in use).

   (c) Create communications material for customers (e.g., signs, pamphlets) to inform them of changes to restaurant or bar practices and to explain the precautions that are being taken to prevent infection.

   (d) Close waiting areas and ask customers to wait in cars for a call when their table is ready.

   (e) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.

   (f) Provide physical guides, such as tape on floors or sidewalks and signage on walls to ensure that customers remain at least six feet apart in any lines.

   (g) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.

   (h) Post sign(s) instructing customers to wear face coverings until they get to their table.

   (i) Require hosts and servers to wear face coverings in the dining area.

   (j) Require employees to wear face coverings and gloves in the kitchen area when handling food, consistent with guidelines from the Food and Drug Administration ("FDA").

   (k) Limit shared items for customers (e.g., condiments, menus) and clean high-contact areas after each customer (e.g., tables, chairs, menus, payment tools, condiments).

   (l) Train employees on:

      (1) Appropriate use of personal protective equipment in conjunction with food safety guidelines.

      (2) Food safety health protocols (e.g., cleaning between customers, especially shared condiments).

      (3) How to manage symptomatic customers upon entry or in the restaurant.

(m) Notify employees if the employer learns that an individual (including an employee, customer, or supplier) with a confirmed case of COVID-19 has visited the store.

(n) Close restaurant immediately if an employee shows multiple symptoms of COVID-19 (fever, atypical shortness of breath, atypical cough) and perform a deep clean, consistent with guidance from the FDA and the CDC. Such cleaning may occur overnight.

(o) Install physical barriers, such as sneeze guards and partitions at cash registers, bars, host stands, and other areas where maintaining physical distance of six feet is difficult.

(p) To the maximum extent possible, limit the number of employees in shared spaces, including kitchens, break rooms, and offices, to maintain at least a six-foot distance between employees.

9. Outpatient health-care facilities, including clinics, primary care physician offices, or dental offices, and also including veterinary clinics, must:

(a) Post signs at entrance(s) instructing patients to wear a face covering when inside.

(b) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask patients, if possible, to wait in cars for their appointment to be called.

(c) Mark waiting rooms to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).

(d) Enable contactless sign-in (e.g., sign in on phone app) as soon as practicable.

(e) Add special hours for highly vulnerable patients, including the elderly and those with chronic conditions.

(f) Conduct a common screening protocol for all patients, including a temperature check and questions about COVID-19 symptoms.

(g) Place hand sanitizer and face coverings at patient entrance(s).

(h) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and the U.S. Occupational Health and Safety Administration.

(i) Require patients to wear a face covering when in the facility, except as necessary for identification or to facilitate an examination or procedure.

(j) Install physical barriers at sign-in, temperature screening, or other service points that normally require personal interaction (e.g., plexiglass, cardboard, tables).

(k) Employ telehealth and telemedicine to the greatest extent possible.

(l) Limit the number of appointments to maintain social distancing and allow adequate time between appointments for cleaning.

(m) Employ specialized procedures for patients with high temperatures or respiratory symptoms (e.g., special entrances, having them wait in their car) to avoid exposing other patients in the waiting room.

(n) Deep clean examination rooms after patients with respiratory symptoms and clean rooms between all patients.

(o) Establish procedures for building disinfection in accordance with CDC guidance if it is suspected that an employee or patient has COVID-19 or if there is a confirmed case.

10. Employers must maintain a record of the requirements set forth in Sections 1(c), (d), and (k).

11. The rules described in sections 1 through 10 have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 10 of this order will proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.

12. Any business or operation that violates the rules in sections 1 through 10 has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011.

13. Nothing in this order shall be taken to limit or affect any rights or remedies otherwise available under law.

Given under my hand and the Great Seal of the State of Michigan.

Date: May 21, 2020

Time: 9:49 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-100

Amending certain previously issued executive orders to clarify their duration

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Acting under the state of emergency declared in Executive Order 2020-4, I issued several executive orders to make reasonable and necessary adjustments to various laws and procedures to help mitigate the effects of the COVID-19 pandemic. In particular, to suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, I adopted Executive Orders 2020-9 on March 16, 2020, which closed places of public accommodation, and Executive Order 2020-21 on March 23, 2020, which directed residents to remain at home or in their place of residence to the maximum extent feasible.

Since then, the virus has spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the growing and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

Following the declarations of emergency and disaster in Executive Order 2020-33, I issued and amended a number of executive orders that also made reasonable and necessary adjustments to various laws and procedures. In particular, in Executive Orders 2020-20 and 2020-43, I extended the order closing places of public accommodation. And in Executive Orders 2020-42 and 2020-59, I extended the order directing residents to stay home and stay safe.

On April 30, 2020, although the emergency and disaster caused by the COVID-19 pandemic was still ongoing, the Legislature refused to extend the states of emergency and disaster. For that reason, as required by statute, I issued Executive Order 2020-66, terminating the states of emergency and disaster. The same day, because the COVID-19 pandemic still presented a threat to human life and the public health, safety, and welfare of this state, I issued Executive Order 2020-67, which declared a state of emergency under the Emergency Powers of the Governor Act, and Executive Order 2020-68, which declared a state of emergency and a state of disaster under the Emergency Management Act.

The measures put in place by my executive orders have been effective: the number of new confirmed cases each day is slowly dropping. Although the virus remains aggressive and persistent—on May 21, 2020, Michigan reported 53,510 confirmed cases and 5,129 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. With Executive Orders 2020-70, 2020-77, 2020-92, and 2020-96, we have begun the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. At the same time, with Executive Order 2020-69, I retained and extended the order closing places of public accommodation. We must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

Executive Orders 2020-67 and 2020-68 have been challenged, however, in Michigan House of Representatives and Michigan Senate v Whitmer. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are likely to be appealed.

Today, I issued Executive Order 2020-99, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

With this order, I find it reasonable and necessary to extend Executive Orders 2020-62, 2020-69, and 2020-96 for three weeks from the date of this order. I also find it reasonable and necessary to clarify and, as necessary, amend the duration of certain executive orders that followed Executive Order 2020-04 and Executive Order 2020-33 given that they have been superseded by later emergency and disaster declarations.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this

executive order. In relevant part, the EPGA provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The following executive orders remain in effect and do not terminate until the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.

   (a) Executive Order 2020-26.

   (b) Executive Order 2020-28.

   (c) Executive Order 2020-36.

   (d) Executive Order 2020-39.

   (e) Executive Order 2020-58.

   (f) Executive Order 2020-61.

   (g) Executive Order 2020-64

   (h) Executive Order 2020-76.

2. The following executive orders are amended as follows:

   (a) Under Executive Order 2020-46, the Michigan Liquor Control Commission may take physical possession of any spirits held by any licensee to which the Commission holds legal title at any time later than 90 days after the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.

(b) Under Executive Order 2020-52, any three-year certificates that were set to expire on December 31, 2019 and were deemed unexpired will not expire until 60 days after the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.

(c) Under Executive Order 2020-55, the Michigan Coronavirus Task Force on Racial Disparities will continue its work until 90 days after the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later, or such other time as the governor identifies.

(d) Under Executive Order 2020-58, all deadlines applicable to the commencement of all civil and probate actions and proceedings, including but not limited to any deadline for the filing of an initial pleading and any statutory notice provision or other prerequisite related to the deadline for filing of such a pleading, remain suspended and shall be tolled until the end of the states of emergency and disaster declared in Executive Order 2020-99 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.

3. Executive Orders 2020-62, 2020-69, and 2020-96 will remain in effect until 11:59 pm on June 12, 2020.

Given under my hand and the Great Seal of the State of Michigan.

Date: May 22, 2020

Time: 4:52 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE